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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 572

JESSE JAMES ARNOLD AND GEORGE DIXON,

PETITIONERS,

vs.

NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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1 EIGHTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Terms, 1962

From Lenoir

STATE OF NORTH CAROLINA

v.

JESSE JAMES ARNOLD AND GEORGE DIXON

Before McELROY, J., 4 December 1961 Term, Criminal Term, Lenoir Superior Court. Defendants appealed in Forma Pauperis.

Statement of Case

The Bill of indictment charged the defendants each with murder in the first degree of George T. McArthur, while in the perpetration of robbery. The Solicitor put the defendants, and each of them, on trial for murder in the first degree.

The defendants each pled not guilty. Thereupon the State introduced evidence and neither defendant introduced evidence.

The jury returned a verdict of guilty of first degree murder as against each and both of the defendants. Each and both defendants made a motion to set aside the verdict. The motion was denied and each and both defendants excepted.

The Court pronounced Judgment against each and both defendants, that they be caused to inhale lethal gas of sufficient quantity to cause death. Each and both defendants objected to the Judgment and excepted thereto and appealed in forma pauperis to the Supreme Court of North Carolina.

2 IN THE SUPERIOR COURT OF LENOIR COUNTY,
NORTH CAROLINA

Organization of Court

It is agreed that Honorable Henry L. Stevens, Jr., Regular Judge of the Superior Court, was duly commissioned, authorized and empowered to hold, and did hold, the October Criminal 1961 Term of the Superior Court of Lenior County; that at said Term the grand jury returned a bill of indictment as hereinafter set forth.

That Honorable W. H. S. Burgwyn is a Special Judge and was duly commissioned, authorized and empowered to hold, and did hold, the 4 December Criminal 1961 Term of the Superior Court of Lenoir County, during which Term the defendants George Dixon and Jesse James Arnold were tried upon the following bill of indictment and the petit jury returned a verdict of guilty of first degree murder; that the sending of further evidence showing the organization of the Lenoir County October Criminal 1961 Term and the Lenoir County 4 December 1961 Term, including the grand jury and petit jury, is hereby waived by the State of North Carolina and by each and both defendants.

It is further agreed that Walter T. Britt is a Solicitor of that portion of the Eighth Judicial District which embraces Lenoir County and was present and prosecuted the case for the State; that J. Harvey Turner, of Kinston, was present and represented defendant Jesse James Arnold and Fred W. Harrison, of Kinston, was present and represented defendant George Dixon; and that defendant George Dixon and defendant Jesse James Arnold were personally present in court during the trial of the case.

WALTER T. BRITT,
Solicitor of 8th District.

J. HARVEY TURNER,
Attorney for Defendant
Jesse James Arnold

W. FRED HARRISON,
Attorney for Defendant
George Dixon

IN THE SUPERIOR COURT OF LENOIR COUNTY

Bill of Indictment

The Jurors for the State upon their oath present, That George Dixon and Jesse James Arnold late of the County of Lenoir, on the 10th day of September in the year of our Lord one thousand nine hundred and sixty-one, with force and arms, at and in the County aforesaid, unlawfully, willfully, and feloniously premeditatively and deliberately and of their malice aforethought, did kill and murder George T. McArthur while engaged in the perpetration of the
3 Crime of robbery against the form of the statute in such case made and provided and against the peace and dignity of the State.

WALTER T. BRITT, *Solicitor*

ENDORSED: State vs. George Dixon and Jesse James Arnold
WITNESSES:

John B. Edwards
X Kirby Hardy
H. E. Broadway

Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found A True Bill.

AARON JOHNSON
Forman Grand Jury

IN THE SUPERIOR COURT OF LENOIR COUNTY

Order Appointing Counsel—Sept. 16, 1961

It appearing to the undersigned resident Judge of the Eighth Judicial District that the defendant above named stands accused and charged with a capital crime of first degree murder, and the Court finding as a fact that said defendant is without means of employing counsel to represent him, and it further appearing to the Court that it is necessary that the Court appoint counsel to represent said defendant;

IT IS, THEREFORE, ORDERED that J. Harvey Turner, a member of the Lenoir County Bar, be and he is hereby

appointed and assigned as counsel for Jesse James Arnold to represent and defend him in the above-entitled criminal action wherein he stands charged with the capital offense of first degree murder.

This 16th day of September, 1961.

(Signed) ALBERT W. COWPER
Resident Judge,
Eighth Judicial District

---

4 IN THE SUPERIOR COURT OF LENOIR COUNTY

Order Appointing Counsel—September 16, 1961

It appearing to the undersigned Resident Judge of the Eighth Judicial District of North Carolina that the above-named defendant stands charged with the capital felony of First Degree Murder; and it further appearing to the undersigned Resident Judge that the above-named defendant is unable by reason of his poverty to employ counsel for his necessary and profer defense;

IT IS NOW, THEREFORE, ORDERED, pursuant to North Caroline General Statute 14-4.1, that Fred W. Harrison, Attorney at Law, be, and he is hereby appointed and assigned by the Court to make an investigation of these charges and to represent and defend the above-named defendant on the charge of first degree murder.

This the 16th day of September, 1961.

(Signed) ALBERT W. COWPER
Resident Judge of the
Eighth Judicial District
of North Carolina

IN THE SUPERIOR COURT OF LENOIR COUNTY

STATE OF NORTH CAROLINA

VS.

JESSE JAMES ARNOLD

Order for Mental Examination

THIS CAUSE, coming on to be heard before the Honorable Albert W. Cowper, Resident Judge of the 8th Judicial District of North Carolina, pursuant to North Carolina General Statutes 122-91, and being heard upon motion made by the above-named defendant through J. Harvey Turner, attorney appointed by the Court to represent said defendant, for an order committing said defendant to the State Hospital at Goldsboro, North Carolina for observation and treatment in the manner prescribed by law for a mentally disordered person; and

IT APPEARING TO THE COURT that the defendant has been indicted on felony charges, to wit: FIRST DEGREE MURDER and other felonies; and

IT FURTHER APPEARING TO THE COURT that said defendant should be committed to the State Hospital at Goldsboro, North Carolina for observation and treatment by the superintendent of said hospital to determine his mental condition:

IT IS NOW, THEREFORE, ORDERED that Jesse James Arnold be and he is hereby committed to the State Hospital at Goldsboro, North Carolina for observation and examination by the superintendent of said hospital, and under the direction and supervision of the said superintendent for a period of 30 days after the date of his said admission into the State Hospital for the purpose of determining the mental status of said defendant and particularly the degree, if any, of his mental disorder.

IT IS FURTHER ORDERED that the superintendent of the State Hospital at Goldsboro, North Carolina, shall file in the office of the Clerk of the Superior Court of Lenoir County on or before the 1st of December, 1961, a full report of the examination conducted by him of the said defendant under the terms and provisions of this order and furnish a copy of said report to the Honorable Walter T. Britt,

Solicitor of the 6th Solicitorial District, at his office in Clinton, North Carolina, and a copy of said report to J. Harvey Turner, attorney for the above named defendant at P. O. Box 853, Kinston, North Carolina.

It Is Further Ordered that said defendant should be transmitted to the State Hospital at Goldsboro, North Carolina for the examination herein directed by the Sheriff of Lenoir County, or other lawful officer in whose custody he might be held in the State of North Carolina.

It Is Further Ordered that said defendant shall be released by the Superintendent of the State Hospital at Goldsboro, North Carolina, to the Sheriff of Lenoir County, or other lawful officer for his return to the custody in which he is now held, at the end of the 30 days commitment.

6 (Signed) Albert W. Cowper
Judge 8th Judicial District.

IN THE SUPERIOR COURT OF LENOIR COUNTY

State of North Carolina

vs.

George Dixon

Order for Mental Examination

This Cause coming on to be heard before the Honorable Albert W. Cowper, Resident Judge of the 8th Judicial District of North Carolina, pursuant to North Carolina General Statutes 122-91, and being heard upon motion made by the above-named defendant through Fred W. Harrison, attorney appointed by the Court to represent said defendant, for an order committing said defendant to the State Hospital at Goldbsoro, North Carolina for observation and treatment in the manner prescribed by law for a mentally disordered person; and

It Appearing to the Court that the defendant has been indicted on felony charges, to wit; First Degree Murder and other felonies; and

IT FURTHER APPEARING TO THE COURT that said defendant should be committed to the State Hospital at Goldsboro, North Carolina for observation and treatment by the superintendent of said hospital to determine his mental condition:

IT IS NOW, THEREFORE, ORDERED that George Dixon be and he is hereby committed to the State Hospital at Goldsboro, North Carolina for observation and examination by the superintendent of said hospital, and under the direction and supervision of the said superintendent for a period of 30 days after the date of his said admission into the State Hospital for the purpose of determining the mental status of said defendant and particularly the degree, if any, of his mental disorder.

IT IS FURTHER ORDERED that the superintendent of the State Hospital at Goldsboro, North Carolina, shall file in the office of the Clerk of the Superior Court of Lenoir County on or before the 1st day of December, 1961, a full report of the examination conducted by him of the said defendant under the terms and provisions of this order and furnish a copy of said report to the Honorable Walter T. Britt, Solicitor of the 6th Solicitorial District, at
7 his office in Clinton, North Carolina, and a copy of said report to Fred W. Harrison, attorney for the above named defendant, at P. O. Box 853, Kinston, North Carolina.

IT IS FURTHER ORDERED that said defendant should be transmitted to the State Hospital at Goldsboro, North Carolina for the examination herein directed by the Sheriff of Lenoir County, or other lawful officer in whose custody he might be held in the State of North Carolina.

IT IS FURTHER ORDERED that said defendant shall be released by the Superintendent of the State Hospital at Goldsboro, North Carolina, to the Sheriff of Lenoir County, or other lawful officer, for his return to the custody in which he is now held, at the end of the 30 days commitment.

(Signed) ALBERT W. COWPER
Judge Presiding.

IN THE SUPERIOR COURT OF LENOIR COUNTY

STATE

VS.

JESSE JAMES ARNOLD

Renewal of Motion for Continuance and Mental Examination

NOW COMES the defendant, Jesse James Arnold, by and through his attorney and respectfully shows unto the Court:

1. That the defendant stands charged with the capital crime of murder alleged to have been committed on or about the 10th day of September, 1961; That on the 16th day of September, 1961, the undersigned attorney was appointed to represent the said defendant by His Honor, Albert W. Cowper, Resident Judge of the Eighth Judicial District.

2. That on or about the 22nd day of October, 1961, His Honor, Albert W. Cowper, Resident Judge of the Eighth Judicial District, entered an order in the above-entitled action whereby it was ordered that Jesse James Arnold be committed to the State Hospital at Goldsboro, North Carolina, for observation and examination by the superintendent of said hospital and under the direction and supervision of the said superintendent for a period of thirty days after the date of his admission into said hospital for the purpose of determining the mental status of said defendant and particularly the degree, if any, of his mental disorder; that pursuant to said order, the defendant was admitted to said hospital on the 23rd day of October, 1961; that on October 27, 1961, Dr. C. R. Brown prepared "Clinical Notes as a Summary for staff" of said hospital; that on November 8, 1961, Dr. Brown, through the Psychology Department of said hospital, filed a report on the defendant; that on November 15, 1961, Dr. Brown prepared another report from the Psychology Department; that the report from said State Hospital shows that a major staff conference was held in respect to the defendant abovenamed on November 14, 1961; that all of said examinations

and other occurrences and the determinations of the defendant's mental status were arrived at considerably prior to the expiration of the 30-day observation period and that in fact, according to the report filed in this case, all considerations reached by the official of said hospital were made prior to and before the expiration of the 30-day period for which the defendant was committed for examination; that the letter from Dr. N. B. Kyles, Assistant Superintendent of said hospital, mailed with the reports on the results of the examination of the defendant is dated November 20, 1961, and directed to John S. Davis, Clerk of the Superior Court, Lenoir County, Kinston, North Carolina.

3. That the defendant was returned to Lenoir County on or about October 24, 1961.

4. That on the call of the calendar for cases for trial at this Term of the Superior Court of Lenoir County, the defendant moved that this case be continued for the Term in order to afford the defendant with ample opportunity to prepare his defense; that said motion was denied and the defendant noted an exception thereto.

5. That the defendant is a negro man approximately 28 years of age with little or no education and that he can neither read nor write; that as the undersigned is advised and believes he does not have sufficient mental capacity to understand and realize the charge against him and the effect of a verdict of guilty and that as the undersigned is further advised and believes, justice demands that the defendant be examined by private practicing psychiatrist and psychologist to determine whether or not the defendant has sufficient mental capacity to stand trail for the crime with which he is charged.

6. That the defendant has no funds and no property with which to employ counsel and with which to secure private examination into his mental condition.

WHEREFORE, the undersigned attorney for the defendant respectfully renews his motion that the above-entitled action be continued for the Term and that an order be entered

providing for the defendant's mental examination by competent private practicing psychiatrist and psychologist.

This 7th day of December, 1961.

(Signed) J. Harvey Turner
Attorney for defendant

(Seal)
(Notary Public)

Subscribed and sworn to before me this 7th day of December, 1961.

(Signed) Nell Bozeman
Notary Public

My commission expires April 6, 1962.

IN THE SUPERIOR COURT OF LENOIR COUNTY

State

- vs -

George Dixon and Jesse James Arnold

Order for Special Venire—December 5, 1961

This cause coming on to be heard and it appearing to the Court that the above-named defendants are each indicted for the murder of one George T. McArthur; it being alleged by the State, said murder having occurred in the perpetration of a robbery in Lenoir County, on or about the tenth day of September 1961, and the bill charging said parties with first degree and found to be a true bill at a preceding term, and the defendants having been arraigned at this term charged with said offense of murder in the first degree, and for their plea have pled that they are not guilty and for the trial of themselves have placed themselves upon God and their Country;

And it further appearing to the Court, upon the statements of counsel for the defendants and the counsel for the State, and statements made to the Court by the Sheriff of Lenoir County, that the alleged murder has been talked in and around this County of Lenoir since its alleged perpetra-

tion and that it would be impossible for either side to obtain a fair, just and impartial trial from a jury to be drawn from Lenoir County, and the defendants counsel having moved that a jury be drawn from some other county other than Lenoir, and the State having consented thereto.

The Court now, in the exercise of its discretion, and for the purpose of obtaining a fair trial for both sides, finding that neither side could obtain a fair trial from a jury
9-A in Lenoir County, directs that a special venire of One hundred and fifty persons be drawn and duly summoned from the adjoining County of Duplin, to be in the Court Room, in Kinston, N. C., at 9:30 o'clock a.m., Thursday, December 7, 1961, to the end that so many of them as shall be so chosen shall serve as jurors in the above trial.

This the 5 day of December 1961.

(Signed) W. H. S. Burgwyn
Judge Presiding

NORTH CAROLINA—IN THE SUPERIOR COURT, LENOIR COUNTY

4 December Term 1961

Cases 6169 and 6170

STATE

vs.

GEORGE DIXON AND JESSE JAMES ARNOLD

TO THE CLERK OF THE SUPERIOR COURT OF DUPLIN COUNTY:

You will take notice from the above Order hereto attached, that a SPECIAL VENIRE has been ordered from your county of Duplin, to be and appear at the Court Room in Kinston, Lenoir County, at 9:30 o'clock A.M., on Thursday, December 7, 1961, for the purpose of permitting so many of said Special Venire as shall be chosen to act as jurors in the trial of the above-entitled cases:

Therefore, you are directed to have drawn by the Clerk of the County Commissioners from Box Number One of the Jury Boxes of your County, in the manner prescribed by

law, in your office, in the Courthouse in Kenansville, between the hours of 9:30 o'clock A.M. and 12:00 noon, on Tuesday, December 5, 1961, one hundred and fifty scrolls, and the names of such persons as shall appear on said scrolls to be delivered to the Sheriff of Duplin County, who shall have them and each of them summoned to be and appear at the Courthouse in Kenansville, at 8:30 o'clock A.M., on Thursday, December 7, and from thence said Sheriff shall have each and every of said persons who shall have answered said summon transported to the Courthouse in Kinston, N. C., by 9:30 A.M. on said Thursday, December 7, 1961. Said Sheriff shall provide at the expense of Lenoir County, the transportation of each and every of said veniremen, and shall make a due return of this Order, in writing, to the Clerk of Superior Court of Lenoir County, at 9:30 o'clock A.M., on Thursday, December 7, 1961.

9-B The Clerk of the Superior Court of Duplin County shall furnish an itemized statement of each juror's name to the Sheriff of Duplin County, together with his Post Office address, or place of residence; and in addition thereto shall furnish to counsel for the defendant an itemized statement of all veniremen, together with their Post Office addresses or place of residence in Duplin County; and shall also furnish to the Solicitor of the State of North Carolina an itemized statement of each of said veniremen, together with their Post Office address or place of residence in Duplin County.

This 5th day of December, 1961.

(Signed) W. H. S. Burgwyn
Judge Presiding

NORTH CAROLINA—IN THE SUPERIOR COURT, LENOIR COUNTY

4 December Term 1961

Cases 6169 and 6170

STATE

- VS -

GEORGE DIXON AND JESSE JAMES ARNOLD

TO THE HIGH SHERIFF OF DUPLIN COUNTY: GREETINGS:

You are hereby directed to summon the one hundred and fifty persons whose names are hereto attached from the County of Duplin, to appear as a Special Venire, at 9:30 o'clock A.M. 1961, for the purpose of permitting so many of said Special Venire as shall be chosen to act as jurors in the above-entitled cases; as drawn by the Clerk of the Superior Court of Duplin County in Kenansville, N. C.; said persons to appear in Kenansville Courthouse on Thursday, December 7, 1961, and be transported to the Courthouse in Kinston on Thursday, December 7, 1961 at the expense of Lenoir County; and you shall make due return, in writing, to the Clerk of the Superior Court of Lenoir County.

HEREIN FAIL NOT.

(Signed) W. H. S. BURGWYN
Judge Presiding

NORTH CAROLINA—DUPLIN COUNTY

TO HIS HONOR, W. H. S. BURGWYN, JUDGE PRESIDING
SUPERIOR COURT OF LENOIR COUNTY:

9-C In compliance with your order of December 5, 1961, in an action pending in the Superior Court of Lenoir County and entitled "State -vs- George Dixon and Jesse James Arnold" the foregoing and attached 5 sheets is a list of the jurors drawn from the Jury Box of Duplin County:

These names were drawn by a child under ten years of age and called out by R. E. Revell, Deputy Sheriff of Duplin County, and the names written down as drawn by

Mrs. Christine W. Williams, Register of Deeds and Clerk to the Board of County Commissioners of Duplin County.

All this being done in the presence of Mr. H. C. Broadway, Sheriff of Lenoir County, and Mr. Fred Harrison of the Kinston Bar, attorney for the defendants.

This December 5, 1961.

(Signed) R. V. Wells
Clerk of Superior Court

(Signed) Christine W. Williams
Register of Deeds and Clerk to
Board of County Commissioners
of Duplin County

NORTH CAROLINA—DUPLIN COUNTY

To His Honor, W. H. S. Burgwyn, Judge Presiding
Superior Court of Lenoir County:

In obedience to your order of December 5, 1961, the jurors drawn from the Jury Box of Duplin County, as certified by Clerk Superior Court and Register of Deeds of Duplin, were all served except those marked with an X after the name. They were not to be found in Duplin County.

This December 7, 1961.

(Signed) Ralph Miller
Sheriff of Duplin County

By .....
Deputy Sheriff

9-G IN THE SUPERIOR COURT OF LENOIR COUNTY

STATE

VS.

GEORGE DIXON

Renewal of Motion for Continuance and Mental Examination

NOW COMES the defendant, George Dixon, by and through his attorney and respectfully shows unto the Court:

1. That the defendant stands charged with the capital crime of murder alleged to have been committed on or about the 10th day of September, 1961; that on the 16th day of September, 1961, the undersigned attorney was appointed to represent the said defendant by His Honor, Albert W. Cowper, Resident Judge of the Eighth Judicial District.

2. That on or about the 22nd day of October, 1961, His Honor, Albert W. Cowper, Resident Judge of the Eighth Judicial District, entered an order in the above-entitled action whereby it was ordered that George Dixon be committed to the State Hospital at Goldsboro, North Carolina, for observation and examination by the superintendent of said hospital and under the direction and supervision of the said superintendent for a period of thirty days after the date of his admission into said hospital for the purpose of determining the mental status of said defendant and particularly the degree, if any, of his mental disorder; that pursuant to said order the defendant was admitted to said hospital on the 23rd day of October, 1961; that on October 27, 1961, Dr. C. R. Brown prepared "Clinical Notes as a Summary for staff" of said hospital; that on November 8, 1961, Dr. Brown through the Psychology Department of said hospital, filed a report on the defendants; that on November 15, 1961, Dr. Brown prepared another report from the Psychology Department; that the report from said State Hospital shows that a major staff conference was held in respect to the defendant above-named on November 14, 1961; that all of said examinations and other occurrences and the determinations of the defendant's mental status were arrived at considerably prior

to the expiration of the 30-day observation period and that in fact, according to the report filed in this case, all considerations reached by the official of said hospital were made prior to and before the expiration of the 30-day period for which the defendant was committed for examination; that the letter from Dr. N. B. Kyles, Assistant Superintendent of said hospital, mailed with the report on the results of the examination of the defendant is dated November 20, 1961, and directed to John S. Davis, Clerk of the Superior Court, Lenoir County, Kinston, North Carolina.

3. That the defendant was returned to Lenoir County on or about October 24, 1961.

4. That on the call of the calendar for cases for trial at this Term of the Superior Court of Lenoir County, the defendant moved that this case be continued for the Term in order to afford the defendant with ample opportunity to prepare his defense; that said motion was denied and the defendant noted an exception thereto.

5. That the defendant is a negro man approximately 30 years of age with little or no education; that as the undersigned is advised and believes he does not have sufficient mental capacity to understand and realize the charge against him and the effect of a verdict of guilty and that as the undersigned is further advised and believes, justice demands that the defendant be examined by private practicing psychiatrists and psychologist to determine whether or not the defendant has sufficient mental capacity to stand trial for the crime with which he is charged.

6. That the defendant has no funds and no property with which to employ counsel and with which to secure private examination into his mental condition.

WHEREFORE, the undersigned attorney for the defendant respectfully renews his motion that the above-entitled action be continued for the Term and that an order be entered

providing for the defendant's mental examination by competent private practicing psychiatrist and psychologist.

This 6th day of December, 1961.

(Signed) FRED W. HARRISON,
Attorney for defendant

NOTARY SEAL

Subscribed and sworn before me this 6th day of December 1961.

(Signed) NEIL BOZEMAN
Notary Public

My commission expires April 6, 1962.

IN THE SUPERIOR COURT OF LENOIR COUNTY

STATE

VS.

JESSE JAMES ARNOLD

Motion to Strike Special Venire

NOW COMES the defendant, Jesse James Arnold, by and through his attorney and respectfully shows unto the Court:

1. That the defendant stands charged with the capital crime of murder in the first degree alleged to have been committed on or about the 10th day of September, 1961.

2. That on the 16th day of September, 1961, the undersigned attorney was appointed to represent the said defendant by His Honor, Albert W. Cowper, Resident Judge of the Eighth Judicial District.

3. That on or about the 5th day of December, 1961, His Honor, W. H. S. Burgwyn signed an order directing the Clerk of the Superior Court of Duplin County to draw from jury box number one, 150 names as a special venire for the trial of this case on Thursday, December 7, 1961.

4. That the said 150 names were drawn from jury box number one by the Register of Deeds of Duplin County under the supervision and direction of the Clerk of the Superior Court of Duplin County on December 5, 1961.

5. That this defendant, Jesse James Arnold, was not present at the said drawing in person or by counsel; that the undersigned attorney as counsel for Jesse James Arnold was unable to attend the drawing of the special venire by reason of the fact that he was counsel in several cases scheduled to be tried on Tuesday, December 5,
12 1961, which said cases the Court and the Solicitor refused to continue in order that the undersigned attorney might attend the drawing of the special venire in Duplin County.

6. That this defendant was entitled to be represented at the drawing of the special venire and to put him to trial with a jury selected from this special venire would in effect be depriving him of substantial rights.

Whereupon defendant moved that trial jury panel be striken.

(Signed) J. Harvey Turner
Attorney for defendant

NOTARY SEAL

Subscribed and sworn to before me this 7th day of December, 1961.

(Signed) Nell Bozeman
Notary Public

My comm. expires April 6, 1962.

IN THE SUPERIOR COURT OF LENOIR COUNTY

State

vs.

Jesse James Arnold

Renewal of Motion to Quash

Now Comes the defendant, Jesse James Arnold, by and through his attorney J. Harvey Turner and renews his motion to quash the indictment, made before pleading, rendered against him by the Grand Jury at the October Term of the Superior Court of Lenoir County, and in support of said motion he offers to show:

1. That he is a negro and that negroes constitute approximately thirty-nine per cent of the population of Lenoir County, North Carolina, from which the Grand Jury was selected.

2. That in the history of Lenoir County only one member of the negro race has legally served upon the Grand Jury and that there are some negroes in Lenoir County qualified for service upon the Grand Jury and their exclusion therefrom has been systematic solely because of their race.

13 3. That to require this defendant to stand trial upon the indictment rendered by such Grand Jury from which members of the negro race have been so excluded would deprive him of equal protection under the laws and of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Sec. 17 of the Constitution of North Carolina.

Now, Therefore, the defendant renews his motion that the indictment herein be quashed for the reasons above stated and that an order be entered requiring the selection of a new Grand Jury fairly and properly chosen in such a manner so as to not systematically exclude therefrom persons otherwise eligible for jury service solely because such persons are members of the negro race.

This 7th day of December, 1961.

(Signed) J. Harvey Turner
Attorney for defendant

IN THE SUPERIOR COURT OF LENOIR COUNTY

State

vs.

George Dixon

Renewal of Motion to Quash

Now Comes the defendant, George Dixon, by and through his attorney Fred W. Harrison and renews his motion to quash the indictment, made before pleading, rendered

against him by the Grand Jury at the October Term of the Superior Court of Lenoir County, and in support of said motion he offers to show:

1. That he is a negro and that negroes constitute approximately thirty-nine per cent of the population of Lenoir County, North Carolina, from which the Grand Jury was selected.

2. That in the history of Lenoir County only one member of the negro race has legally served upon the Grand Jury and that there are some negroes in Lenoir County qualified for service upon the Grand Jury and their exclusion therefrom has been systematic, solely because of their race.

3. That to require this defendant to stand trial upon the indictment rendered by such Grand Jury from which members of the negro race have been so excluded would deprive him of equal protection under the laws and of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Article 1, subdivision 17 of the Constitution of North Carolina.

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Now, Therefore, the defendant renews his motion that the indictment herein be quashed for the reasons above stated and that an order be entered requiring the selection of a new Grand Jury fairly and properly chosen in such a manner so as to not systematically exclude therefrom persons otherwise eligible for jury service solely because such persons are members of the negro race.

This 6th day of December, 1961.

(Signed) Fred W. Harrison
Attorney for defendant

16 IN THE SUPERIOR COURT OF LENOIR COUNTY

Defendant's Evidence on Motion

MILTON GUY WILLIAMS (Defendant)

Direct Examination

Questions by Attorney Turner:

Q. Will you state your full name, please, sir? A. Milton Guy Williams.

Q. Mr. Williams, by whom are you employed? A. By the County of Lenoir, through the Board of County Commissioners.

Q. And what is your official position? A. Tax Superviser.

Q. In your job as Tax Superviser, do you have control and charge of all the tax lists and listings of the County? A. Yes, sir, I do.

Q. Do you have records before you which will show how many Negroes are on the tax scrolls or tax records for year 1961, sir? A. Yes, sir, I have two different figures.

Q. Will you give those, please, sir. A. Mr. Turner, the total number of abstracts classified as whites and those classified as colored are here, and also of the total amount of pole tax listings by white and colored. The total amount of the abstracts for the county in the white are 12,250; and the total amount of abstracts for
17 colored are 4819, a total of 17,069.

Q. Now, will you give us the total on the other? A. The total amount of white poles listed, that is between the ages of twenty-one and forty-nine, inclusive is 5,583 for white and 2,499 for colored, or a total of 8,082.

Q. When you say "colored" you are referring to the members of the Negro race? A. Yes.

Q. In the tax records of Lenoir, which you have under control, do you keep the listings of the members of the Negro and white citizens? A. Yes, sir, the law requires it.

Q. You keep the Negro or colored listings in one file, separate and apart and distinct from the white listings? A. Yes, sir.

Q. Well, under the circumstances and conditions of the records of your office, do not the colored people constitute a separate and distinct group by themselves? A. Mr. Turner, to answer that question, I would refer you to the law of North Carolina, which requires that white people or white listings be kept separate, that the colored listings be kept separate, and also the Indian citizens, but we do not have any Indians in this county.

Q. Mr. Williams, do not the members of the Negro race constitute a separate and distinct class of citizens in this county?

Objection by the State, sustained, exception by
18 defendants.

Arnold Exception 3. Dixon Exception C.

Counsel for defendants declined to examine the witness further.

Court: Do you know anything about the constitution of the grand jury here this week? A. I do not know about that, your Honor.

Court: Well, I do. I saw it.

JOHN S. DAVIS (Clerk Superior Court) (Defendants)

Direct Examination

Questions by Attorney Harrison:

Q. Your name is Mr. John Davis? A. John S. Davis.

Q. By whom are you employed, Mr. Davis? A. Lenoir County.

Q. In what capacity? A. As Clerk of the Superior Court.

Q. How long have you been in that capacity? A. Something over twenty-four years.

Q. Now Mr. Davis, in those twenty-four years that you have been Clerk of the Superior Court of Lenoir County, how many Negroes have appeared upon the Grand Jury from Lenoir County? A. I remember one having served the term and a second was placed on, but she was a resident of Pitt County and was excused.

19 Q. Then in twenty-four years, only one Negro has ever served on the grand jury? A. That is all that I remember.

Q. To the best of your recollection, is that right? A. Yes, sir.

Cross Examination

Questions by Solicitor Britt:

Q. Have there been Negroes among the jury panels in this county? A. Yes, sir, quite a few.

Q. And you say one of them appeared on the grand jury? A. To my knowledge.

Q. But two have actually been drawn on the grand jury, and you draw your grand jury each six months, do you not. A. January and August terms.

Q. And do you know whether or not Negroes have been systematically excluded from grand jury service or pettit jury service in Lenoir County? A. Not to my knowledge.

Redirect Examination

Questions by Attorney Harrison:

Q. Mr. Davis, what is the largest number of Negroes you have seen upon the regular jury panel, at one time? A. Four or five.

Q. Do you recall when that was, Mr. Davis? A. No, sir.

Court: My understanding is, that you draw from
20 the jury boxes a list of names to serve as grand jurors and that they are drawn regardless of race or color? A. Judge I can't answer from the box. A list of jurors are given us for the January and August Terms, and that list is clipped in small bundles and put in a box, and there has been no discrimination of colored people in the selection of the grand jury from the list given us at those terms.

Court: Well, state whether or not the names are drawn from the jury box at each term by a child under the age of ten years of age? A. Yes, they are drawn from the jury list, from the box, by a small child.

Q. And that procedure is carried out until the jurors are drawn? A. Yes, sir.

Q. And the names on the scrolls are put on the grand jury list? A. Yes, sir.

Q. And from those scrolls, another child at another place, draws from the hat, sight on seeing, until the jurors are drawn, is that correct? A. Yes, sir.

Q. Regardless of race, color or creed? A. Yes, sir.

Court: The motion is denied, exception to each and both defendants.

Attorney Turner: If your Honor please, may I
21 ask one or two more questions?

Court: All right.

Questions by Attorney Turner:

Q. Mr. Davis, I suppose you have a record of those jurors who have served in the past, is that correct? A. Yes, sir, we have the jury lists.

Q. Usually what is the number of jurors drawn to appear at the various terms of this court? A. Sometimes there are not any, sometimes there are three or four.

Q. And you mean, Negroes? A. Colored people, yes, sir.

Q. Now what is the total number of jurors usually drawn and summoned to appear and serve at a term of this court? A. The average total that appear, from thirty to thirty-five.

Court: The Court finds as a fact, upon the evidence introduced at this hearing, that there is no systematic exclusion of colored people or Negroes for service on the grand or pettit juries in this county. Motion denied, exception by both defendants.

Arnold Exception 2c. Dixon Exception B.

Court: For the information of the Court, may I inquire of the Sheriff of Duplin County, can you tell me whether or not there are any Negroes on this panel as drawn from your boxes in Duplin County?

22 Sheriff Ralph Miller: Do how?

Court: Can you tell me whether or not there are any Negroes in the panel of the special venire as drawn from your county of Duplin?

Sheriff Miller: Yes, sir, a good number of them.

Court: How many would you say?

Sheriff Miller: I don't know, I believe half of them, about half of them.

Court: A considerable number?

Sheriff Miller: A big number?

Court: The Court finds as a fact that the special venire as drawn from Duplin County to appear for the trial of

these two cases, is composed of members of both the Caucasian and the Negro races, about in the ratio of forty to sixty per cent. Do you have anything further?

Attorney Turner: No, sir.

Arnold Exception 4. Dixon Exception D. 7

* * * * * * * * * * *

118 IN THE SUPERIOR COURT OF LENOIR COUNTY

Charge to Jury

Gentlemen of the Jury, the case which we have been engaged in trying for the past days is a case of the State of North Carolina vs. George Dixon and Jesse James Arnold, a criminal action, charging the two defendants and each with what is known in law as the crime or the felony of murder in the first degree, the bill of indictment reading as follows: State of North Carolina, Lenoir County, Superior Court, October Term, A.D. 1961. The Jurors for the State upon their oath present, That George Dixon and Jesse James Arnold late of the County of Lenoir, on the 10 day of September, in the year of our Lord one thousand nine hundred and 61, with force and arms,

119 at and in the County aforesaid, unlawfully, willfully, and feloniously, premeditatively and deliberately and of their malice aforethought did kill and murder George T. McArthur while engaged in the perpetration of the crime of robbery against the form of the statute in such case made and provided and against the peace and dignity of the State. Signed Britt, Solicitor, and found to be a true bill at that term of Superior Court.

Upon this charge or bill the defendants have been arraigned in open court and for their pleas have pleaded not guilty and for their trial thereof have placed themselves upon God and their country, which country you are. So your duty is to consider the evidence which you have heard in this case, from the beginning of it to the final witness who testified in the case, and to glean from that evidence what you deem to be the truth of the matter, and to apply to what you deem to be the truth of the matter from the evidence in the case, the law which will be hereafter given you by the Court; (and upon that ren-

der a verdict wh'ch in your conscience and mind substantially speaks the truth.)

Each defendan excepts to foregoing portion of charge in parentheses.

Arnold Exception 17. Dixon Exception O.

Upon their plea of not guilty, Gentlemen, these defendants, and each of them, come into court surrounded by and clothed with a presumption of innocence; which remains around and about them throughout the entire
120 trial, unless and until the State—and when I use the term State I mean the prosecution—shall have satisfied you, the jury, of their guilt beyond a reasonable doubt.

A reasonable doubt, Gentlemen, is a doubt based upon reason and common sense and arising from the testimony in the case; and it is not any vain, imaginary, captious or fictitious doubt, nor is it a doubt suggested by the ingenuity of counsel nor a doubt suggested by your own ingenuity of mind, nor one born of a merciful inclination to spare the defendants any punishment. It is, however, an honest misgiving. If upon the conclusion of all of the testimony and argument of counsel and charge of the Court you cannot say that you have an abiding faith to a moral certainty in the defendants' guilt, either or both of them, it would in that event become your duty to find that one of them, or both of them, are not guilty; for you then would have what the law terms to be and defines to be a reasonable doubt in regard thereto.

On the other hand, if upon the conclusion of the testimony and argument of counsel and charge of the Court, you can and do say that you have an abiding faith to a moral certainty of their guilt, or the guilt of either of them, it would in that event become your duty to find that one of them, or both of them are guilty, for in that event you would not have what the law terms to be and defines to be a reasonable doubt in respect thereto.

Now, Gentlemen, you have heard considerable
121 argument by counsel on both sides, and able arguments on both sides in regard to this matter; during the course of which one or more of them have touched upon what may be the law in this case.

(I now instruct you that it is your duty to take the law from the Court, that is, the presiding judge, and not from attorneys on either side; who well may differ as to what the law may be; and you are to bear in mind that if this Court should make a mistake as to what the law is in this case that the Supreme Court in Raleigh, not only has the power but has the wisdom to correct any mistake this Court may make and upon an appeal would do so.)

Each defendant excepts to the foregoing portion of charge in parentheses.

Arnold Exception 18. Dixon Exception P.

You will notice that this bill charges, or indictment charges, these men with what is known in law as murder in the first degree. There are three degrees of murder recognized by our law in North Carolina, in fact four; murder in the first degree, murder in the second degree, and manslaughter—voluntary or involuntary manslaughter. With none of these definitions are you now concerned, except the one in regard to murder in the first degree.

Murder in the first degree ordinarily is the killing of a human being by another person with malice, and with premeditation and with deliberation and malice aforethought, and it must be done in a state of cool blood.

122 However, our Legislature many years ago passed a statute in which they have said, as follows, in respect to felonious killings in North Carolina. As to murders or homicides, when we speak of homicides we mean the killing of a man; coming from the two Latin words, homo, meaning man, and sico, meaning to kill; and over sixty years ago the Legislature of this State passed laws on this subject, which have been amended up to the present, which I will read to you up to the time that it has been amended. A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starvation, torture or from any other deliberate and premeditated killing or which shall be committed in the perpetration or attempt to perpetrate any person, rape or robbery, shall be punished with death, provided if at the time of rendering its verdict in open court the jury shall so recommend, the punishment sha'l be imprisonment for life in the State Prison; and the Court shall so instruct the jury, and which I now do.

(So you will see, Gentlemen, that if the State has satisfied you from the testimony and beyond a reasonable doubt that these two men, in an attempt to perpetrate or in the perpetraion of a robbery from the person or premises, and that is the store building in which he was staying at the time, of Mr. McArthur, a robbery of any merchandise or money from his person or from his place of business, and in so doing either one or the other killed Mr. McArthur, then the law says that they both would be guilty of murder in the first degree.

Now Gentlemen, whether or not a conspiracy, that
123 is to say, a pre-fixed conspiracy or agreement had been made by the parties in question to go into the home or place of business of Mr. Atwater——

Solicitor Britt: McArthur, your Honor.

Court: —to rob him existed, would make no particular difference. If at the time he was killed by either one or both of these defendants, they were present at or in his place of business, aiding and assisting each other in a common purpose of design to rob him, and one or the other or both fired a shot which killed him, or struck a blow which killed him, either one, it makes no difference which, both would be equally guilty of murder in the first degree.)

Each defendant excepts to the foregoing portion of charge in parentheses.

Arnold Exception 19. Dixon Exception Q.

(Now there is no conspiracy expressly set out in the bill of indictment and it is not necessary that it should be so included in the bill of indictment, and it is not necessary that it should have been alleged in the bill: but if the State has satisfied you beyond a reasonable doubt from the evidence that these two defendants Dixon and Arnold prior to the time of the alleged killing of Mr. McArthur entered into a conspiracy to rob him, and pursuant to their conspiracy so entered into and while in the attempt to carry out an unlawful purpose, to wit, the robbery of Mr. McArthur, one of them shot and killed him, the other being present, the Court instructs you, Gentlemen of the Jury, that both of the defendants under these circum-
124 stances would be guilty of murder in the first degree.)

Each defendant excepts to the foregoing portion of charge in parentheses.

Arnold Exception 20. Dixon Exception R.

(I further charge you, without regard to the existence or absence of a conspiracy, it is a settled principle of law apparently applicable to the facts in this instant case, that where two persons aid and abet each other in the commission of a crime, provided you are satisfied from this evidence and beyond a reasonable doubt that they did so, both being present, both are principals and equally guilty.)

Each defendant excepts to the foregoing portion of charge in parentheses.

Arnold Exception 21. Dixon Exception S.

These defendants and both of them contend that they are not guilty of any offense and that you ought not to be satisfied from the testimony and beyond a reasonable doubt that either of them are guilty and that your verdict should be not guilty.

As to their contentions, the Court will allude to them within a few minutes.

The state on the other hand contends that you should be so satisfied beyond a reasonable doubt and find both of them guilty as charged in the bill of indictment, that is to say both of them guilty of murder in the first degree.

The State contends that all of the evidence tends
125 to show that these two young men, one of them twenty-eight years of age and the other around twenty-one, on the day in question, had agreed that they needed money and that one of them, the older, Arnold by name, had said that he knew an old man who lived nearby; that he had known him for a long time, and that he had money and that it would be an easy thing to go and rob him; that there wouldn't be anybody there but two persons, that is to say the old gentleman and his wife, an elderly lady, and that they could arm themselves and go there and rob him.

The state contends that the evidence tends to show that Arnold lived nearby the home of Mr. McArthur, that he was a neighbor of his, so to speak. That the widow of Mr. McArthur has testified that she was there when Arnold, the defendant, was born, about 1935 or thereafter,

and that she had known him all these years; that he traded with her and her husband; that they had accommodated him and that he had got in debt to them and hadn't been back there to trade for about a year before this occasion.

The State contends that this man had cast his eyes upon this home or this place of business for sometime wit han idea to affect a robbery of it, and the State contends that the evidence tends to show that his young man and his co-defendant that they agreed that they would go back from a place they had been to, Johnny Edwards' place, where they had danced and passed the time in pleasure, that when they got back they would go over to this place and rob him.

126 And the State contends that the evidence tends to show that when they got back that evening, that they changed their clothes, that they took off the clothes that they had ordinarily been seen in, and denuded their bodies down to the waist, having nothing on their body above the waist; and that they put on khaki pants and gum boots; and the state contends the evidence tends further to show that they armed themselves, not only with one gun but with two guns, and that they went forth to rob and, if necessary, to kill, and that is what the state contends that they did; that they walked, and in going to the place they didn't pursue their usual course down the highway, but that they went out from the highway in the bushes so that they couldn't be seen; and that when they got there these two young ladies were there, who testified in the case and whom you heard testify; and that they waited for them to leave. That Arnold went to the back door and asked Mr. McArthur for cigarettes and he brought them to him; that upon his saying he was unable to pay for the cigarettes that he didn't let him have them and came back in the store and said in the presence of these two young ladies, "This has happened to me before."

(And the State contends further that these men then went outside or stayed outside and Arnold came back to his co-defendant and said to him, "That man recognized me, you go back and come in." And the state contends

127 that this man did go back there, after the young ladies left, and that he went back, that is to say that the defendant Dixon went back and went in; and

that when he got in, after some words perhaps with Mr. McArthur, or perhaps not any words, he shot him down. That he shot him twice; that some other people passing by heard three shots and they went on, not wishing to go back there and not knowing a man was being killed, to be sure, and they went on.)

Each defendant excepts to the foregoing portion of the charge in parentheses.

Arnold Exception 22. Dixon Exception T.

And the State further contends that the defendant Arnold then went in, and that he took part in the shooting, firing a shot that went into the body of Mr. Atwater, tearing a hole through his arm and into his body, and into the vital organs, from which he died; it also being contended by the state that he struggled against these men and that there was a murder, the State contends, committed in the store building; that these men, (the state contends, were without pity, shot, struck, and murdered this old gentleman, for money; contending that they were willing to kill a man in order to get a few dollars, and that they did do so.)

Each defendant excepts to the foregoing portion of the charge in parentheses.

Arnold Exception 23. Dixon Exception U.

And that they tok from the building a box, which they thought contained money, and an adding machine, which they thought had money in the bottom of it; and
128 that they then went across the road, and didn't go home down the road, as the State contends, which was some distance down the main highway, Highway Number 11, but that they went across the highway into a field grown up with weeds, coming back again and coming up to the other side of the road by the hog pen of the defendant Arnold's father. That some colored man, knowing that they were bad hogs, hollered to them and said, "Look out for those hogs," and that the defendant Arnold said, "I know those hogs; they are my daddy's hogs."

(And the State further contends that they went on to Arnold's home, carrying with them what they thought was their loot, as the State contends, that they had taken from this old gentleman's little store.)

Each defendant excepts to the foregoing portion of the charge in parentheses.

Arnold Exception 24. Dixon Exception V.

And that they got home and got his wife and went down the road some distance to another house and got a man to take them then over to Johnny Edwards' place again, a place where colored people congregated for pleasure, danced, and had music there, and while there they slipped out and broke open what they thought was their box containing treasure, and that they found out they only had that box and that adding machine and no money; and that they threw the battered machine into the sand hole or pond, about sixty yards away from the place where they were.

(And the State contends that then, not caring
129 that they had killed a man, not worried over that at all, they danced until midnight with their friends who didn't know what they had done;)

Each defendant excepts to the foregoing portion of the charge in parentheses.

Arnold Exception 25. Dixon Exception W.

and later they got another person, who brought one of them back, brought Arnold back home and the other one on his way to Greene County, and that when he got home he found the officers of the law, who had gone there to investigate and that they had fixed their suspicion upon Arnold and Dixon, on account of information they received from the family of Arnold, who did not attempt, as the State contends or at least the State does not contend that they attempted to shield him in any way. And the officers found out that they had gone and left the boots that they had worn, outside of the house; that they put the guns back in their customary places that night, that they put their trousers back in the house and dressed again before they went over to Johnny Edwards' place.

(And the State contends that this is a pure act of carnal violence against an old gentleman, who never had done either one of them any harm, and that he was murdered for the love of money, in order that they might have a few dollars from robbery of a person who had been in that community most of the life of one of them, at least

and the State contends you should be satisfied beyond
130 a reasonable doubt of their guilt and find them both guilty of murder in the first degree.)

Each defendant excepts to the foregoing portion of the charge in parentheses.

Arnold Exhibit 26. Dixon Exhibit X.

(Now, Gentlemen, I haven't read over my notes in regard to the evidence in this case; I will do so if you desire me to do it; but I do ask you to remember all the evidence in the case, the evidence of Mr. Edwards, of the State Bureau of Investigation, the evidence of these young ladies who were there at the store, the evidence of these colored people who told what they knew about it, and all of the evidence of what they claimed to know about it and all the evidence which you have heard in this case; and from that evidence you will glean what you believe to be the truth and applying to the truth the law which has been given you by the Court, say for your verdict whether or not you are satisfied beyond a reasonable doubt that the defendants be guilty or not guilty of murder in the first degree.)

To the foregoing portion of the charge in parentheses, each defendant excepts.

Arnold Exception 27. Dixon Exception Y.

(They contend that they are not guilty, they contend that they are victims of certain circumstances, but that they are circumstances not sufficient, as they contend, to satisfy you beyond a reasonable doubt of their guilt. They contend that each one of them have made certain statements
131 to Mr. Edwards, that while they may have done so, they contend that they are not sufficient, even though they did make them, they say that these statements are not sufficient as to carry conviction to your minds and hearts of their guilt; and that each one saying the other one did the shooting, and that their statemen s are such that you can't find what the truth is about it. And they contend that they didn't shoot Mr. Atwater; that Mrs. Atwater—)

Solicitor Britt: McArthur, your Honor.

To the foregoing portion of the charge in parentheses each defendant excepts.

Arnold Exception 28. Dixon Exception Z.

—that Mrs. McArthur testified that at the time he was shot, that she saw a car come up there in a little driveway heading up to her house, and that the lights went out, and that that car drove away; and that it is entirely possible and probable that some one on that car, some more people than they, or other persons than they, they contend, did this killing and they didn't without their having any knowledge of it.

They do not admit that they went to this store; they do not admit that they saw Mr. Atwater; they deny it, and they claim that you should find them not guilty, they contending that one of them had lived there all his life; that he knew Mr. Atwater and Mrs. Atwater; that they had never done anything against him nor he hadn't done anything against them, that their families lived there in peace
132 and harmony and as friends, and that there has been no bad feeling between them in any way, and that he would have no motive to do this thing and that he didn't do so; and he contends you should have a reasonable doubt about his guilt, or both of them, and find neither of them guilty, but find them not guilty; contending that Mr. Edwards has been very anxious to convict somebody about this matter and that he is probably doing what he thought was right, but that he is mistaken about what he says and what he is saying, and that he used such influence over them that they said things for fear or in the hope that they might be light on them. (And they contend from all the evidence in the case you should have a reasonable doubt about their having killed Mr. Atwater and find each of them not guilty.

Solicitor Britt: May I interrupt your Honor. The man who was killed was Mr. McArthur. You called his name as Atwater each time.

Court: I beg your pardon, I mean Mr. McArthur. Gentlemen: pardon me. I am getting to be an old man, and I sometimes get names mixed up, unless I am familiar with them.

Wherever I used the word, "Atwater", Gentlemen, I meant the gentleman who got shot, whatever his name is.)

To the foregoing portion of the charge in parentheses, each of the defendants except.

Arnold Exception 29. Dixon Exception AA.

(Now, Gentlemen, the State calls your attention to the evidence that has been introduced, the evidence of
133 Mr. Johnny Edwards, of Pete Barrett, better known by some other name, who lived in Greene County; and of Thelma Mae Rouse and Beatrice Rouse and Iris Janette Rouse, John Rouse and a Miss Barbara Batchelor and Miss Mary Batchelor, her sister, one being sixteen and the other fourteen years of age, and of Albert Carter and James Anderson.

Solicitor Britt: Albert Harper, your Honor. And James Anderson, Horace Jones, and especially did the State call to the stand to testify and give evidence Mrs. McArthur, who testified in substance that she is sixty-two years old and is the widow of Mr. McArthur; and that she was at her house that evening cleaning up, after a day in which some of the family had been there and she was cleaning up the home.)

To the foregoing portion of the charge in parentheses, each defendant excepts.

Arnold Exception 30. Dixon Exception BB.

She testified that she lived about seventy-five or a hundred feet from the store, or a little farther and that her husband went down there and she saw a light come on in the store and she thought somebody was in there and he was accommodating them, as the State contends he was these young girls, selling them something, and she remembered that these young ladies came by, and that she looked out a little later and saw the lights were still there, and she saw a tall slim colored man at the back door.

And the State contends from the testimony in the
134 case you should be satisfied beyond a reasonable doubt that was the defendant Arnold, standing at the back door.

(And she testified when she finished her vacuum cleaning, she saw a car drive into the driveway and turn off the lights and then it went away. That she went up the

stairs and looked again down there and saw the lights still in the store, and she became suspicious and she went down there and found her husband dead, lying in a pool of blood and that she fell down beside him. That finally she got up and saw the cash register was gone, and she saw two gun shells on the floor, and she knew he had been shot; and that she was blinded with tears but she found the number on the telephone to call the Sheriff's office, and she called them and they came out.)

To the foregoing portion of the charge in parentheses each defendant excepts.

Arnold Exception 31. Dixon Exception CC.

That she had known Arnold ever since he was born in 1935; that he came to the store regularly until he got in debt with her, then he quit. That she stayed in the store most of the time and her husband tended to the garden and everything around home.

And the State contends that Mr. Kirby Hardy and others have testified and especially Mr. Edwards, to evidence which should satisfy you beyond a reasonable doubt of these defendants' guilt and that you should be satisfied of their guilt beyond a reasonable doubt and find them
135 guilty of murder in the first degree.

Now Gentlemen, are there any further contentions you gentlemen desire me to make?

Attorney Turner: No, sir.

Attorney Harrison: No, sir.

Solicitor Britt: No, sir.

I want to thank you, Gentlemen, for the attention you have paid to the evidence in this case, and I want to impart to you the duty of remembering the evidence. If your recollection of the evidence differs from that of counsel on either side or of the court, itself, you will be guided by your own recollection, as your recollection is superior to that of the Court or counsel on either side. You have now had the opportunity to see the witnesses upon the witness stand; you have had the opportunity to judge whether they spoke truthfully or whether they spoke falsely; you had an opportunity to judge whether they knew that about which they were speaking.

You have a right to believe altogether what a witness says or you have a right to disbelieve a witness in part

and to believe that same witness in part; for as I say, you have a right to believe a witness in full or to discredit a witness completely, as you find him or her or them worthy or unworthy of your belief.

(This, Gentlemen, is a serious case, it is serious for these defendants; it is serious for the State; and you,
136 as jurors have a serious duty to perform, one more serious than any you have ever had heretofore and one more serious than you will ever perhaps perform again, the duty of judging between your state and two of your fellow-citizens, upon a question of *their life or their death —a duty that is almost God-like in* its nature, and a duty which has been justly called the stern daughter of the voice of God, demanding that you shall give to these two defendants and to the State a fair and just and impartial trial.)

To the foregoing portion of the charge in parentheses, each defendant excepts.

Arnold Exception 32. Dixon Exception DD.

(This is not a question, Gentlemen, of sympathy for any one, nor is it a question of prejudice against any one; you have no passion to appease; you have no sorrow to assuage; you are sworn men with one and only one duty to perform, that duty being to render a verdict in this case which according to the evidence in the case and the law which has been and will be given you by the Court, that substantially speaks the truth.)

To the foregoing portion of the charge in parentheses, each defendant excepts.

Arnold Exception 33. Dixon Exception EE.

The word "verdict" comes from two Latin words, vere meaning truly, and dictum, meaning to speak; therefore, let your verdict be a true saying, let your verdict speak the truth.

(As I have told you, on the evidence in this case
137 and the law as the Court understands the law to be and as the Court has explained it to you, you will be permitted to render one of three verdicts; *you may render a verdict of guilty as to both defendants of murder in the first degree, you may render a verdict as to both defendants of guilty of murder in the first degree, recom-*

mending that their punishment be fixed at life imprisonment, or you may find both defendants not guilty.

To the foregoing portion of the charge in parentheses, each defendant excepts.

Arnold Exception 34. Dixon Exception DD.

(If the State has satisfied you from the evidence and beyond a reasonable doubt, that the defendants Dixon and Arnold acting jointly, in an attempt to rob or in the robbery of the person of Mr. McArthur, that either one or both shot him and killed him, it would be your duty to return a verdict of guilty. And if you so find, at the time of rendering your verdict, in open Court you, the jury, may recommend that their punishment be imprisonment for life in the State's Prison, and that will be their punishment, imprisonment for life in the State's Prison.)

To the foregoing portion of the charge in parentheses, each defendant excepts.

Arnold Exception 35. Dixon Exception EE.

(If you find that the defendants are guilty of murder in the first degree and stop there, that is, you do not recommend that their punishment be imprisonment for
138 life in the State Prison, then their punishment will be death. There are no conditions, no qualifications, no limitations imposed as to your right to recommend that the punishment be imprisonment for life in the State Prison; that is a matter in the jury's own unbridled discretion.)

To the foregoing portion of the charge in parentheses, each defendant excepts.

Arnold Exception 36. Dixon Exception FF.

Now Gentlemen, this is this case, as far as I can see it, and as far as I understand the evidence and the law to be. If there is anything either of you want the Court to charge the jury, I will be glad to do it.

(The Solicitor and two defendant counsel come to the bench.)

It has been brought to my attention, Gentlemen, by the Solicitor, that these defendants did not take the witness stand, and their counsel have asked me to charge you in respect thereto, which I will be glad to do.

(The law in this state is that a person does not have to testify in a case in which he is being charged with a criminal offense, unless he desires to do so; he has a right to remain silent, because in all criminal actions that are heard in this courthouse, any defendant may remain mute and say nothing and to rely upon what he contends to be the weakness of the state's case. And I charge you that the fact that these two men, neither of them, took the witness stand in the case and testified, is not a circumstance that you should consider as tending to show guilt
139 of either or both of these defendants, as they were within their legal rights in remaining silent and mute and relying upon what they contend to be the weakness of the state's case.)

To the foregoing portion of the charge in parentheses, each defendant excepts.

Arnold Exception 37. Dixon Exception GG.

(Therefore, Gentlemen, take the case, find the truth, as you find the truth to be from the testimony in the case, apply to the facts, the truth as you find those facts from all the evidence as it came from the witnesses in this case, applying thereto the law which is given to you by the Court, and to render a verdict which *substantially* speaks the truth.)

To the foregoing portion of the charge in parentheses, each defendant excepts.

Arnold Exception 38. Dixon Exception HH.

(You may retire and say whether you find the defendants guilty of murder in the first degree, or whether you find the defendants guilty of murder in the first degree and recommend that their punishments be fixed at life imprisonment or whether you find the defendants not guilty.)

To the foregoing portion of the charge in parentheses, each defendant excepts.

Arnold Exception 39. Dixon Exception II.

Take the case.

* * * * * * * * * *

(The jury retired and then returned to the court-room).

140 Gentlemen of the Jury, since you have gone to your room, it occurred to the Court that possibly there is one phase of the charge which I didn't make clear, or may I say perhaps plain to you; and I now wish to repeat, in part, what I said in regard to your verdicts.

(If you find the prisoners guilty of first degree murder —and hear this in mind please, if the State has satisfied you from the evidence and beyond a reasonable doubt that the defendants Dixon and Arnold, acting jointly, in an attempt to rob the person of Mr. McArthur, or in robbing him, either one or both shot him and killed him, it would be your duty to return a verdict of guilty or murder in the first degree against both of the defendants; and if you so find, at the time of rendering your verdict in open Court, you may recommend that the punishment for either one or both of the defendants, be imprisonment for life in the State's Prison, then that will be their punishment, imprisonment for life in the State's Prison. If you find the defendants guilty of murder in the first degree, and stop there, that is, do not recommend that their punishment or the punishment of either shall be imprisonment for life in the State's Prison, then their punishment would be death. That is all.)

To the foregoing portion of the charge in parentheses, each defendant excepts.

Arnold Exception 46. Dixon Exception JJ.

IN THE SUPERIOR COURT OF LENOIR COUNTY

Verdict

The jury returned a verdict of: Guilty of Murder in the first degree.

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141 IN THE SUPERIOR COURT OF LENOIR COUNTY

Motion to Set Aside Verdict and Denial Thereof

Upon the coming in of the verdict, and in open Court, the defendants, George Dixon and Jesse James Arnold, each and both, moved the Court to set aside the verdict, as being contrary to the evidence in the cases, each and both, motion

denied; defendants George Dixon and Jesse James Arnold, each and both, except.

Arnold Exception 41. Dixon Exception KK.

IN THE SUPERIOR COURT OF LENOIR COUNTY

Motion for New Trial and Denial Thereof

The defendants George Dixon and Jesse James Arnold, each and both, moved the Court for a new trial, for errors committed during the trial; and among other things, for that the Solicitor for the State in his argument to the jury, was allowed over objection to argue forcefully and vigorously to the effect that the jury had to bring in a verdict of murder in the first degree to prevent such capital crimes as murder, rape, arson and first degree burglary; and also that many advances have been made in recent years, such as flight into orbit and that it is planned to send a man to the moon, but that in spite of all the advances we still have the percentage of capital crimes as we have had about forty years ago in this State, and the way to control these crimes is to exact the supreme penalty allowed by law by putting these boys out of circulation and I mean Permanently.

Motion denied; both and each defendants excepted.

Arnold Exception 42. Dixon Exception LL.

IN THE SUPERIOR COURT OF LENOIR COUNTY

Judgment and Appeal Entries

The prisoner at the Bar of the Court, George Dixon, having been at this time tried upon a Bill of Indictment charging Murder in the First Degree, and the jury chosen,
sworn and empanelled to pass between him and the
142 State touching his guilt or innocence of the crime of
which he stood charged, having upon said charge, returned as against him a verdict of guilty of murder in the First Degree. Now, therefore, in compliance with the law, the judgment of the Court pronounced upon the said George Dixon is that the said George Dixon be taken hence

by Henry Clary Broadway, High Sheriff of Lenoir County, North Carolina, and by him delivered into the custody of the Warden of the Penitentiary of North Carolina, in the City of Raleigh, North Carolina, to be by he said warden safely detained until Friday, the 26th day of January, 1962; and that on the 26th day of January, 1962, the said warden of the Penitentiary of North Carolina, or in case of his death, inability or absence, a deputy warden of said institution, shall between the hours of ten o'clock A.M. and four o'clock P.M. convey the said George Dixon to the place prepared for execution, and then and there upon the day designated, the 26th day of January, 1962, between the hours fixed on said day, ten o'clock A.M. and four o'clock P.M., in the manner provided by law, cause the said George Dixon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until the said George Dixon is dead.

And May Almighty God have mercy on his soul.

Done at Kinston, North Carolina, this 9th day of December, 1961.

(Signed) W. H. S. Burgwyn
Judge Presiding.

The prisoner at the Bar of the Court, Jesse James Arnold, having been at this term tried upon a Bill
143 of Indictment charging Murder in the First Degree, and the jury chosen, sworn and empaneled to pass between him and the State touching his guilt or innocence of the crime of which he stood charged, having upon said charge, returned as against him a verdict of guilty of murder of the First Degree. Now, therefore, in compliance with the law, the judgment of the Court pronounced upon the said Jesse James Arnold is that the said Jesse James Arnold be taken hence by Henry Clary Broadway, High Sheriff of Lenoir County, North Carolina, and by him delivered into the custody of the Warden of the Penitentiary of North Carolina, in the City of Raleigh, North Carolina, to be by the said warden safely detained until Friday, the 26th day of January, 1962; that on the 26th day of January, 1962, the said warden of the Penitentiary of North Carolina, or in case of his death, inability or absence, a deputy warden of said institution, shall between the hours of ten

o'clock A.M. and four o'clock P.M., convey the said Jesse James Arnold to the place prepared for execution, and then and there upon the day designated, the 26th of January, 1962, between the hours fixed on said day, ten o'clock A.M. and four o'clock P.M., in the manner provided by law, cause the said Jeses James Arnold to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until the said Jesse James Arnold is dead.

And may Almighty God have mercy upon his soul.

Done at Kinston, North Carolina, this the 9th day of December, 1961.

(Signed) W. H. S. BURGWYN
Judge Presiding

144 The defendants George Dixon and Jesse James Arnold, each and both moved that the Judgments be arrested.

Motion denied; each and both defendants excepted.

Arnold Exception 43. Dixon Exception MM.

The defendants and each of them then served notice of appeal to the Supreme Court. Solicitor for the State waives further formal notice. Ninety days allowed to the defendants and each of them to make up the case on appeal; sixty days thereafter allowed the State to make up and serve Counter Case and Exceptions.

(Signed) W. H. S. BURGWYN
Judge Presiding

NORTH CAROLINA—LENOIR COUNTY
IN THE SUPERIOR COURT

STATE

VS.

GEORGE DIXON and JESSE JAMES ARNOLD

ORDER

THIS CAUSE, coming on to be heard, and being heard, by the undersigned Judge of the Superior Court, Presiding at the December 4, 1961, Special Criminal Term of the Superior Court of Lenoir County, North Carolina; and

It appearing to the Court that George Dixon and Jesse James Arnold have been convicted upon an indictment charging them with first-degree murder and upon such conviction have been sentenced to death in the State's Prison as provided by law, and it further appear-
143 ing to the Court upon the passing of sentence the defendants prayed an appeal to the Supreme Court of North Carolina from said judgment and that the defendants, George Dixon and Jesse James Arnold, have filed with this Court an affidavit that they, and each of them, are wholly unable to give security for the cost, and are advised by counsel for each of said defendants that they have a good and reasonable cause for the appeal prayed; and that the application is made in good faith, and it further appearing to the Court that the said George Dixon and Jesse James Arnold, and each of them, are unable to defray the cost of perfecting their appeals on account of their poverty;

It Is, Therefore, considered, ordered and adjudged that said defendants are allowed to appeal to the North Carolina Supreme Court as paupers and to that end the County of Lenoir pay the necessary costs of obtaining transcripts for each of said defendants of the proceedings had and evidence offered on the trial from the Court Reporter, for the use of said defendants, and one copy of said transcript for the Solicitor for the State, and the necessary cost of preparing the requisite copies of the record and briefs which the defendants and each of them are required to file in the Supreme Court under the Rules of said Court.

The Reporter is ordered to provide each of said defendants and the Solicitor for the State with a copy of the evidence and charge and other records of the proceedings; it is further ordered that the County Commissioners shall pay him in full for said transcripts, together with
146 the necessary costs of preparing the requisite copies of the record and briefs which the defendants are required to file in the Supreme Court under the Rules of said Court.

This 9th day of December, 1961.

(Signed) W. H. S. Burgwyn
Judge Presiding

Court: Upon the convening of the venire from Duplin County, the Court finds as a fact that on said venire and called to the Book to be examined on their voir dire for service as jurors in this case, were some fourteen colored men, most of whom were excused on account of their opposition to capital punishment; but two of them were accepted and served on the jury throughout the case and the final determination of same.

Service of the foregoing case of appeal in apt time is hereby accepted on behalf of the State.

(Signed) WALTER I. BRITT
Solicitor

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147 IN THE SUPERIOR COURT OF LENOIR COUNTY

Assignments of Error

The defendants appellants assign as error and group their exceptions as follows:

1. For that the Court erred in overruling motion by each of the defendants to continue the case and for complete mental examination. Arnold Exception 1, Dixon Exception A (R. p. 15).

2. For that the Court erred in denying defendant Arnold's motion to strike the trial jury panel. Arnold Exception 2 (R.p. 15).

3. For that the Court erred in denying the defendant's motion to quash the indictment. (Arnold Exception 2a, Dixon Exception B1 (R.p. 21).

4. For that the Court erred in finding as a fact that the special venire as drawn from Duplin County was composed of members of both the caucasian and the negro races about in the ratio of 40 to 60 per cent. Arnold Exception 4, Dixon Exception D (R.p. 22).

5. For that the Court erred in excusing prospective jurors for cause due to non-belief in capital punishment. Arnold Exceptions 5 and 6, Dixon Exceptions E and F (R.p. 23).

6. For that the Court erred in permitting the State to introduce into evidence the boots and guns seized in a search of the defendant Arnold's room. Arnold Exceptions 9 and 16 (R. p. 65 and 110).

7. For that the Court erred in permitting State's
148 witness Edwards to testify as to an alleged confession by the defendant Dixon. Dixon Exception 6 (R. p. 86).

8. For that the Court did not adequately instruct the jury to not consider statements by the defendant Dixon as against the defendant Arnold. Arnold Exception 14. Dixon Exception N (R. p. 97).

9. For that the Court erred in permitting Dr. Cling to testify as to the cause of death of the decedent. Arnold Exception 15, Dixon Exception H (R. p. 100).

10. For that the Court erred in charging the jury:

". . . and upon that render a verdict which in your conscience and mind substantially speaks the truth." Arnold Exception 17. Dixon Exception O. (Rp. p. 119).

"I now instruct you that it is your duty to take the law from the Court, that is, the presiding judge, and not from attorneys on either side; who well may differ as to what the law may be; and you are to bear in mind that if this Court should make a mistake as to what the law is in this case that the Supreme Court in Raleigh, not only has the power but has the wisdom to correct any mistake this Court may make and upon appeal would do so." Arnold Exception 18. Dixon Exception P. (R. p. 121).

"So you will see, Gentlemen, that if the State has satisfied you from the testimony and beyond a reasonable doubt that these two men, in an attempt to perpetrate or in the perpetration of a robbery from the person or premises,
and that is the store building in which he was stay-
149 ing at the time, of Mr. McArthur, a robbery of any merchandise or money from his person or from his place of business, and in so doing either one or the other killed Mr. McArthur, then the law says that they both would be guilty of murder in the first degree.

"Now Gentlemen, whether or not a conspiracy, that is to say, a pre-fixed conspiracy or agreement had been made by the parties in question to go into the home or place of business of Mr. Atwater——

"Solicitor Britt: McArthur, your Honor.

"Court: —to rob him existed, would make no particular difference. If at the time he was killed by either one or both of these defendants, they were present at or in his place of business, aiding and assisting each other in a common purpose or design to rob him, and one or the other or both fired a shot which killed him, or struck a blow which killed him, either one, it makes no difference which, both would be equally guilty of murder in the first degree." Arnold Exception 19. Dixon Exception Q. (R. p. 122, 123).

"Now there is no conspiracy expressly set out in the bill of indictment and it is not necessary that it should be so included in the bill of indictment, and it is not necessary that it should have been alleged in the bill; but if the State has satisfied you beyond a reasonable doubt from the evi-
dence that these two defendants Dixon and Arnold
150 prior to the time of the alleged killing of Mr. McArthur entered into a conspiracy to rob him, and pursuant to their conspiracy so entered into and while in the attempt to carry out an unlawful purpose, to wit, the robbery of Mr. McArthur, one of them shot and killed him, the other being present, the Court instructs you, Gentlemen of the Jury, that both of the defendants under these circumstances would be guilty of murder in the first degree." Arnold Exception 20. Dixon Exception R. (R. p. 123, 124).

"I further charge you, without regard to the existence or absence of a conspiracy, it is a settled principle of law apparently applicable to the facts in this instant case, that where two persons aid and abet each other in the commission of a crime, provided you are satisfied from this evidence and beyond a reasonable doubt that they did so, both being present, both are principals and equally guilty." Arnold Exception 21. Dixon Exception S. (R. p. 124).

"And the State contends further that these men then went outside or stayed outside and Arnold came back to his co-defendant and said to him, 'that man recognized me, you go back and come in.' And the state contends that this man did go back there, after the young ladies left, and that he went back, that is, to say that the defendant Dixon went back and went in; and that when he got in, after some words perhaps with Mr. McArthur, or perhaps not any words, he shot him down. That he shot him twice;
151 that some other people passing by heard these shots and they went on, not wishing to go back there and not knowing a man was being killed, to be sure, and they went on." Arnold Exception 22. Dixon Exception T. (R. p. 126, 127).

". . . the state contends, were without pity, shot, struck, and murdered this old gentleman, for money; contending that they were willing to kill a man in order to get a few dollars, and that they did do so." Arnold Exception 23. Dixon Exception U. (R. p. 127).

"And the State further contends that they went on to Arnold's home, carrying with them what they thought was their loot, as the State contends, that they had taken from this old gentleman's little store." (Arnold Exception 24. Dixon Exception V. (R. p. 128).

"And the State contends that then, not caring that they had killed a man, not worried over that at all, they danced until midnight with their friends who didn't know what they had done;" Arnold Exception 25. Dixon Exception W. (R. p. 128, 129).

"And the state contends that this is a pure act of carnal violence against an old gentleman, who never had done either one of them any harm, and that he was murdered for the love of money, in order that they might have a few dollars from robbery of a person who had been in that community most of the life of one of them, at least and the State contends you should be satisfied beyond a reasonable doubt of their guilt and find them both guilty of murder in the first degree." Arnold Exception 26. Dixon Exception X. (R. p. 129, 130).

152 "Now, Gentlemen, I haven't read over my notes in regard to the evidence in this case; I will do so if you desire me to do it; but I do ask you to remember all the evidence in the case, the evidence of Mr. Edwards, of the State Bureau of Investigation, the evidence of these young ladies who were there at the store, the evidence of these colored people who told what they knew about it, and all the evidence of what they claimed to know about it and all the evidence which you have heard in this case; and from that evidence you will glean what you believe to be the truth and applying to the truth the law which has been given you by the Court, say for your verdict whether or not you are satisfied beyond a reasonable doubt that the defendants be guilty or not guilty of murder in the first degree." Arnold Exception 27. Dixon Exception Y. (R. p. 130).

"They contend that they are not guilty, they contend that they are victims of certain circumstances, but that they are circumstances not sufficient, as they contend, to satisfy you beyond a reasonable doubt of their guilt. They contend that each one of them have made certain statements to Mr. Edwards, that while they may have done so, they contend that they are not sufficient, even though they did make them, they say that these statements are not sufficient as to carry conviction to your minds and hearts of their guilt; and that each one saying the other one did the shooting, and that their statements are
153 such that you can't find what the truth is about it. And they contend that they didn't shoot Mr. Atwater; that Mrs. Atwater——" Arnold Exception 28. Dixon Exception Z. (R. p. 130, 131).

". . . And they contend from all the evidence in the case you should have a reasonable doubt about their having killed Mr. Atwater and find each of them not guilty.

"Solicitor Britt: May I interrupt your Honor. The man who was killed was Mr. McArthur. You called his name as Atwater each time.

"Court: I beg your pardon, I mean Mr. McArthur, Gentlemen; pardon me. I am getting to be an old man,

and I sometimes get names mixed up, unless I am familiar with them.

"Wherever I used the word, 'Atwater', Gentlemen, I meant the gentleman who got shot, whatever his name is." Arnold Exception 29. Dixon Exception AA. (R. p. 132).

"Now, Gentlemen, the State calls your attention to the evidence that has been introduced, the evidence of Mr. Johnny Edwards, of Pete Barrett, better known by some other name, who lived in Greene County; and of Thelma Mae Rouse and Beatrice Rouse and Iris Janette Rouse, John Rouse and a Miss Barbara Batchelor and Miss Mary Batchelor, her sister, one being sixteen and the other fourteen years of age, and of Albert Carter and James Anderson.

"Solicitor Britt: Albert Harper, your Honor.

"And James Anderson, Horace Jones, and especially did the State call to the stand to testify and give
154 evidence Mrs. McArthur, who testified in substance that she is sixty-two years old and is the widow of Mr. McArthur; and that she was at her house that evening cleaning up, after a day in which some of the family had been there and she was cleaning up the home." Arnold Exception 30. Dixon Exception BB. (R. p. 132, 133).

"And she testified when she finished her vacuum cleaning, she saw a car drive into the driveway and turn off the lights and then it went away. That she went up the stairs and looked again down there and saw the lights still in the store, and she became suspicious and she went down there and found her husband dead, lying in a pool of blood and that she fell down beside him. That finally she got up and saw the cash register was gone, and she saw two gun shells on the floor, and she knew he had been shot; and that she was blinded with tears but she found the number on the telephone to call the Sheriff's office, and she called them and they came out. Arnold Exception 31. Dixon Exception CC. (R. p. 134).

"This, Gentlemen, is a serious case, it is serious for these defendants; it is serious for the State; and you, as jurors have a serious duty to perform, one more serious

than any you have ever had heretofore and one more serious than you will ever perhaps perform again, the duty of judging between your state and two of your fellow-citizens, upon a question of *their life or their death—a duty that is almost God-like in* its nature, and a duty which has been justly called the stern daughter of the voice
155 of God, demanding that you shall give to these two defendants and to the State a fair and just and impartial trial." Arnold Exception 32. Dixon Exception DD. (R. p. 135, 136).

"This is not a question, Gentlemen, of sympathy for any one, nor is it a question of prejudice against any one; you have no passion to appease; you have no sorrow to assuage; you are sworn men with one and only one duty to perform, that duty being to render a verdict in this case which according to the evidence in the case and the law which has been and will be given you by the Court, that substantially speaks the truth." Arnold Exception 33. Dixon Exception EE (R. p. 136).

"As I have told you, on the evidence in this case and the law as the Court understands the law to be and as the Court has explained it to you, you will be permitted to render one of three verdicts: *you may render a verdict of guilty as to both defendants of murder in the first degree, you may render a verdict as to both defendants of guilty of murder in the first degree, recommending that their punishment be fixed at life imprisonment*, or you may find both defendants not guilty." Arnold Exception 34. Dixon Exception DD. (R. p. 136, 137).

"If the State has satisfied you from the evidence and beyond a reasonable doubt, that the defendants Dixon and Arnold acting jointly, in an attempt to rob or in the robbery of the person of Mr. McArthur, that either one or both shot him and killed him, it would be your duty to return a verdict of guilty. And if you so find, at the time
156 of rendering your verdict, in open Court you, the jury, may recommend that their punishment be imprisonment for life in the State's Prison." Arnold Exception 35. Dixon Exception EE. (R. p. 137).

"If you find that the defendants are guilty of murder in the first degree and stop there, that is, you do not rec-

ommend that their punishment be imprisonment for life in the State Prison, then their punishment will be death. There are no conditions, no qualifications, no limitations imposed as to your right to recommend that the punishment be imprisonment for life in the State Prison; that is a matter in the jury's own unbridled discretion." Arnold Exception 36. Dixon Exception FF. (R. p. 137, 138).

"The law in this state is 'hat a person does not have to testify in a case in which he is being charged with a criminal offense, unless he desires to do so; he has a right to remain silent, because in all criminal actions that are heard in this courthouse, any defendant may remain mute and say nothing and to rely upon what he contends to be the weakness of the state's case. And I charge you that the fact that these two men, neither of them, took the witness stand in the case and testifie l, is not a circumstance that you should consider as tending to show guilt of either or both of these defendants, as they were within their legal rights in remaining silent and mute and relying upon what they contend to be the weakness of the state's case." Arnold Exception 37. Dixon Exception GG. (R. p. 138, 139.)

"Therefore, Gentlemen, take the case, find the
157 truth, as you find the truth to be from the testimony in the case, applying to the facts, the truth as you find those facts from all the evidence as it came from the witnesses in this case, applying thereto the law which is given to you by the Court, and to render a verdict which *substantially* speaks the truth." (Arnold Exception 38. Dixon Exception HH. (R. p. 139).

"You may retire and say whether you find the defendants guilty of murder in the first degree, or whether you find the defendants guilty of murder in the first degree and recommend that their punishments be fixed at life imprisonment or whether you find the defendants not guilty." Arnold Exception 39. Dixon Exception II. (R. p. 139).

"If you find the prisoners guilty of first degree murder —and bear this in mind please, if the State has satisfied you from the evidence and beyond a reasonable doubt that the defendants Dixon and Arnold, acting jointly, in an

attempt to rob the person of Mr. McArthur, or in robbing him, either one or both shot him and killed him, it would be your duty to return a verdict of guilty of murder in the first degree against both of the defendants; and if you so find, at the time of rendering your verdict in open Court, you may recommend that the punishment for either one or both of the defendants, be imprisonment for life in the State Prison, then that will be their punishment, imprisonment for life in the State Prison. If you find the defendants guilty of murder in the first degree, and
158 stop there, that is, do not recommend that their punishment or the punishment of either shall be imprisonment for life in the State's Prison, then their punishment would be death. That is all." Arnold Exception 40. Dixon Exception JJ. (R. p. 140).

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159 IN THE SUPERIOR COURT OF LENOIR COUNTY

STATE

v.

JESSE JAMES ARNOLD AND GEORGE DIXON

ADDENDUM TO THE RECORD

Verdict

December Term, 1961 Criminal Friday

(Special) December 8, 1961.

The court recall the jury into open court at 8:19 for further instructions or charge. The jury again retire to their room for deliberation at 8:21 and return at 9:30 to render their verdict separately who for their verdict say the defendant George Dixon is guilty of murder in the first degree without the recommendation of mercy and that the defendant Jesse James Arnold is guilty of murder in the first degree without the recommendation of mercy, or recommendation that punishment be fixed at life imprisonment.

Fall Term 1962

No. 291—Lenoir

STATE OF NORTH CAROLINA

v.

JESSE JAMES ARNOLD and GEORGE DIXON

Opinion—February 1, 1963

Appeal by Jesse James Arnold and George Dixon from Burgwyn, Emergency Judge, at 4 December 1961 Criminal Term of Lenoir.

Criminal prosecution tried upon a joint indictment charging that Jesse James Arnold and George Dixon on 10 September 1961 "unlawfully, willfully and feloniously premeditatively and deliberately and of their malice aforethought, did kill and murder George T. McArthur, while engaged in the perpetration of the crime of robbery." G. S. 14-17; G. S. 15-144.

Each defendant is a Negro. After a denial by the court of a separate motion made in apt time (G.S. 9-26) by each defendant to quash the indictment on the ground that Negroes were intentionally excluded solely by reason of their race from the grand jury that returned the joint indictment against them, each defendant entered a plea of Not Guilty. Verdict: "The defendant George Dixon is guilty of murder in the first degree without the recommendation of mercy and that the defendant Jesse James Arnold is guilty of murder in the first degree without the recommendation of mercy, or recommendation that punishment be fixed at life imprisonment."

From a sentence of death entered on the verdict against each defendant, each defendant appeals.

Attorney General T. W. BRUTON and Asisstant Attorney General RALPH MOODY for the State.

J. HARVEY TURNER for defendant appellant Jesse James Arnold.

FRED W. HARRISON for defendant appellant George Dixon.

Parker, J. The State's evidence shows: George T. McArthur, a man 68 years old, and his 62-year-old wife owned and operated a little store on Highway #11 about eight miles north of the city of Kinston. It is about "a stone's throw" from the back door of the store to the house behind the store where they lived. About "dusky dark" on Sunday, 10 September 1961, George T. McArthur went to the store from his home.

About 7:00 o'clock p.m. on this night Jesse James Arnold and a tall Negro entered the McArthur store. Arnold
161 was carrying a shotgun. Both men had on boots and brown khaki pants, but were shirtless and without hats. Three shots were heard in the store. About 15 minutes later these two men came out of the store with some big object in their hands. They went across the highway into a field. A little later they came back across the road, and went towards a hog pen. John Rouse, who lives across the highway from the McArthur store, told them, "You better look out for the hogs, those hogs might get you." One of the men replied, "How well I know, they are my daddy's hogs." The hogs were owned by Glenn Arnold, father of the defendant Arnold.

A short time after this, Ruby McArthur, wife of George T. McArthur, went to the store, as he had not returned home. The lights of the store were on, and the front and back doors were open. When she went in the back door of the store, she saw her husband lying dead on the floor in a pool of blood. Blood was spattered everywhere, all over the walls and ceiling, the back screen door, the back of the meat case, the end of the show case, and all over the freezer. The cash register was gone. Two gun shells were lying between the counter and the front door. She telephoned the sheriff's office.

Shortly after midnight on this night, John D. Edwards, an agent for the State Bureau of Investigation, talked with Jesse James Arnold in the commissioner's room in the courthouse at Kinston. Edwards made Arnold no promises, and used no force or threats. Defendant Arnold told him in substance: About 5:00 o'clock p.m. on 10 September 1961 he and defendant George Dixon were at Johnny Edwards' place (not the agent John D. Edwards). They

talked about various things. Dixon said, "Where can we find some money?" He replied, "he knew an old man that he had known all of his life, that had a lot of money, and that there was not but two of them there." About 6:30 p.m. he and Dixon went to his home. There they discussed further the getting of money from George T. McArthur. He and Dixon put on boots and khaki pants, but no shirts. He got his pump gun, and gave a single barrel shotgun and two gun shells to Dixon. His wife "tried to get him not to go do the robbing," but he and Dixon left and went to the McArthur store. When they arrived, two or three
162 young girls were in the store. They stood outside until the girls left. Then Dixon went to the back of the store, and entered it. He heard a gun fire in the store, and immediately went in the front door. Dixon and McArthur were tussling together, and McArthur was bloody. Dixon shot McArthur, and then hit him with the stock of the gun. McArthur fell, and Dixon shot him again on the floor. He went out of the store, and Dixon came out behind him with "an adding machine" and a box. Later they beat the box open. They found no money in it. Then they threw the box and "the adding machine" in a sand hole in front of Johnny Edwards' place. He and John Rouse had words about the hogs. This is similar to the testimony of John Rouse.

The S. B. I. agent Edwards saw defendant George Dixon about 3:00 o'clock a.m. on 11 September 1961 in the sheriff's office in Kinston. At that time Dixon was so much under the influence of intoxicants in the opinion of Edwards that he did not talk to him. About 7:00 o'clock p.m. on 11 September 1961 in the commissioners' room in the courthouse at Kinston he had a conversation with Dixon. He made him no promises. He told him who he was. Dixon told him in substance: During the afternoon of 10 September 1961 he and defendant Arnold were together at various places. About 5:00 o'clock p.m. they went to Arnold's home. There Arnold said, "George, I know where there is some money at." He said to Arnold, "How are you going to get it?" Arnold replied, "We'll wait until after it gets dark and go down to the store and get the old man out, and we will get the money." He replied, "Let's don't do that, Jesse." Jesse replied, "There ain't going to be nothing to it. I'm

going to carry a gun." They changed clothes, putting on boots, khaki pants, and taking off their shirts. Jesse took a shotgun off the rack, and gave him a single barrel, twelve-gauge shotgun and two shells. Jesse's gun was an automatic. They loaded the guns, and went to the store. Two white girls were in the store with the old man. When the girls left, he went in the back door of the store. The old man was standing near the counter. He was holding the shotgun back of him. He thought the old man must
163 have seen the gun, because he ran at him, shoved him back, swung at him with a knife, and knocked him up against the building. At that time defendant Arnold came in the front door, and shot the old man. The old man fell up against the wall by the back door. Then Jesse hit the old man with his gun, and he hit the old man. Jesse shot the old man again, and he fell down on the floor on his back. He didn't move or make any noise, and Jesse and he knew he was dead. Jesse searched the old man, and found no money. He searched him, and found three quarters. Jesse tried unsuccessfully to open the cash register. He took Jesse's gun, and Jesse took the cash register and the adding machine, and they left. Afterwards they broke open the cash register and the adding machine, found no money in either, and threw them in a sand hole.

In the opinion of John Boyd, an agent of the State Bureau of Investigation, assigned to the ballistics department, the gun shells found in the McArthur store were fired by the pump gun, which was the gun Arnold had.

The body of George T. McArthur had a jagged wound on the top of the skull, a gunshot wound through his left arm about the size of a silver dollar that penetrated his chest, and other wounds. In the opinion of Dr. C. E. Cling, who examined the dead body, George T. McArthur was killed by a shotgun blast at close range.

The record shows that Ruby McArthur identified during the trial the cash register, which she observed was missing when she entered the store. This cash register was marked as State Exhibit 1. The record shows that on the morning of 11 September 1961 Paul Horace Dawson went to a sand hole near Johnny Edward's place and found in it the adding machine, identified as State Exhibit 1. It was in about a

foot of water. He brought it back and turned it over to S. B. I. Agent Edwards. Why State Exhibit 1 was called a cash register by Mrs. McArthur, and why the same exhibit was called an adding machine by Paul Horace Dawson the record does not disclose.

The defendants offered no evidence.

Each defendant assigns as error the overruling of
164 his motion for a continuance and to the denial by the court of his request for an order requiring a mental examination of him by a private practicing psychiatrist and psychologist. In denying this request the court said: "The court now offers to counsel an opportunity to get any private psychiatrist they desire and have their clients examined, at any time during the progress of this trial." These assignments of error are overruled.

On 16 September 1961 Albert W. Cowper, resident judge of the 8th judicial district, appointed J. Harvey Turner, a member of the Lenoir County bar, as counsel to represent defendant Jesse James Arnold in this case—Arnold being without means to employ counsel. Lenoir County is in the 8th judicial district. G. S. 15-4.1. On the same date for the same reason Judge Cowper appointed Fred W. Harrison, a member of the Lenoir County bar, as counsel to represent defendant George Dixon in this case. The indictment here was found by the grand jury a true bill at the October 1961 Term of Lenoir County superior court.

On 22 October 1961 Judge Cowper, upon motion of J. Harvey Turner, attorney for defendant Jesse James Arnold, entered an order, pursuant to G. S. 122-91, committing defendant Arnold to the State Hospital for mentally disordered persons at Goldsboro, North Carolina, for a period of 30 days for observation as to his mental condition. The order further provided that the superintendent of the hospital shall file on or before 1 December 1961 a full report of the examination made at the hospital in the office of the clerk of the superior court, and furnish a copy of it to the prosecuting officer for the State and a copy to J. Harvey Turner, counsel for defendant Arnold.

Upon motion of Fred W. Harrison, counsel for defendant George Dixon, Judge Cowper entered a similar order as to defendant George Dixon.

The reports made by the State Hospital for mentally disordered persons at Goldsboro as to the mental condition of the defendants are not in the record. The separate motions for a continuance and to require a mental examination by a private practicing psychiatrist and psychologist are substantially identical. The sole reason stated in each motion for a further mental examination is because the report from the State Hospital is dated 20 November 1961, and Judge Cowper's order provided that each defendant should be kept for observation for a period of 30
165 days. Defendants have not shown that they were prejudiced by the refusal of their request that the court order a further mental examination. They offered no evidence during the trial.

Their motions for a continuance of the case to another term of court for trial was addressed to the sound discretion of the trial judge. There is nothing to show the judge abused his discretion in denying the motions. S. v. Culberson, 228 N. C. 615, 46 S. E. 2d 647.

Each defendant, a Negro, assigns as error his motion, made before pleading to the indictment, to quash the indictment on the ground that Negroes were intentionally excluded by reason of their race from serving on the grand jury which found the indictment in the instant case.

In support of the motions the defendants offered evidence as follows: In 1961 the tax records of Lenoir County showed 12,250 white persons and 4,819 Negroes; 5,583 white men were listed for poll tax and 2,499 Negro men. This was testified to by Milton Guy Williams, tax supervisor for Lenoir County. Williams was asked by the trial judge if he knew anything about the constitution of the grand jury here this week. Williams replied he did not. The judge stated: "Well, I do. I saw it."

Defendants then called as a witness John S. Davis, clerk of the superior court of Lenoir County. He testified in substance: He has been clerk over 24 years. He remembers during that time one Negro having served a term upon the grand jury, and another Negro was placed on it but excused when it was discovered she lived in another county. Grand juries are selected at the January and August terms of court. He is furnished a list of the jurors drawn for each term of court which has jury trials. The average number

of jurors drawn for jury service is from 30 to 35. On the list furnished him there are sometimes three or four Negroes, and sometimes none. At one time he saw four or five Negroes on the jury panel. When a grand jury is to be drawn, the name of each juror on the jury panel furnished him is put on a separate slip of paper in a box
166 in open court, and a name is drawn out in open court by a child under 10 years of age. This continues until the 18 grand jurors are drawn. So far as he knows, Negroes have not been systematicaly excluded from serving on grand and petit juries in Lenoir County.

From this evidence offered by defendants the trial judge found as a fact that Negroes had not been systematically excluded from service on grand and petit juries in Lenoir County.

It is to be noted that counsel for defendants did not put into evidence a list of grand jurors serving in Lenoir County in the past, nor did they put into evidence the list of the grand jurors that found the present indictment—though such records were available in the office of the clerk of the court. It appears from the record that the grand jury that found the indictment at the October 1961 Term was the grand jury at the trial December 1961 Term, because the clerk testified a grand jury is drawn at the January and August Terms. The tax supervisor, when asked if he knew the constitution of the grand jury at the trial Term, replied he did not. The judge replied: "Well, I do. I saw it." The statement by the judge would seem to indicate there was a Negro or Negroes on the grand jury. Yet the solicitor for the State, if such was a fact, did not show it. Whether there was a Negro or Negroes on the grand jury that found the present indictment, we do not know from the record before us.

N. C. G.S. 9-2 provides that the jury list shall be copied on small scrolls of paper of equal size and put into the jury box. N. C. G.S. 9-3 provides that at least twenty days before a term of the Superior Court, the Board of County Commissioners shall cause to be drawn from the jury box by a child not more than ten years of age the required number of scrolls, and the persons who are inscribed on such scrolls shall serve as jurors at the term of the Superior Court next ensuing such drawing. It appears that the jury list furnished Davis, clerk of the superior court,

was furnished, pursuant to these statutes, by the Board of County Commissioners of Lenoir County. Defendants have offered no evidence of any exclusion of Negroes from the jury box of Lenoir County. Their evidence affirmatively shows that sometimes three or four Negroes are
167 drawn from the jury box of Lenoir County for service as grand and petit jurors.

It further affirmatively appears from the testimony of defendants' witness John S. Davis that the grand jury in Lenoir County is drawn from a box containing the names of the jury panel in accordance with N. C. G.S. 9-24.

The Fourteenth Amendment to the Federal Constitution forbids any discrimination against Negroes in the selection of a grand jury, and the burden is on the defendants here to establish the discrimination against their race. Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692; Fay v. New York, 332 U. S. 261, 91 L. Ed. 2043; Cassell v. Texas, 339 U. S. 282, 94 L. Ed. 839; S. v. Covington, —— N. C. ——, —— S. E. 2d ——; S. v. Perry, 248 N. C. 334, 103 S. E. 2d 404; Miller v. State, 237 N. C. 29, 74 S. E. 2d 513.

Former errors cannot invalidate future trials. Our problem is whether or not Negroes were intentionally excluded solely by reason of their race from serving on the grand jury that found the indictment against defendants in the instant case. Brown v. Allen, 344 U. S. 443, 97 L. Ed 469; Cassell v. Texas, *supra*.

This Court speaking by Ervin, J. (now U. S. Senator) in Miller v. State, *supra*, said:

> "The Fourteenth Amendment to the Constitution of the United States does not confer upon a Negro citizen charged with crime in a state court the right to demand that the grand or petit jury, which considers his case, shall be composed, either in whole or in part, of citizens of his own race. All he can demand is that he be indicted or tried by a jury from which Negroes have not been intentionally excluded because of their race or color. In consequence, there is no constitutional warrant for the proposition that a jury which indicts or tries a Negro must be composed of persons of each race in proportion to their respective numbers as

citizens of the political unit from which the jury is summoned. [Citing numerous cases from the U. S. Supreme Court and from this Court in support of the statement.]"

This Court in an unbroken line of decisions stretching back for sixty years has held, by virtue of "the law of the land" clause embodied in the Declaration of Rights, Article I, section 17, of the North Carolina Constitution, that the indictment of a Negro defendant by a grand jury from which members of his race have been intentionally excluded solely because of their race is a denial of his rights to the equal protection of the laws as guaranteed by the
168 Fourteenth Amendment to the United States Constitution and of his rights under Article I, section 17, of the North Carolina Constitution. S. v. Peoples, 131 N. C. 784, 42 S. E. 814; S. v. Speller, 229 N. C. 67, 47 S. E. 2d 537; Miller v. State, *supra;* S. v. Perry, 248 N. C. 334, 103 S. E. 2d 404; S. v. Perry, 250 N. C. 119, 108 S. E. 2d 447; S. v. Covington, —— N. C. ——, S. E. 2d ——.

Defendants motions to quash the indictment are overruled, for the simple reason they have failed to carry the burden of showing facts which would permit a reasonable inference of intentional or purposeful racial discrimination against Negroes in drawing and selecting the grand jury which returned the indictment against them in the instant case.

After each defendant had entered a plea of not guilty, the court, upon motion of the defendants that a jury to try the case be drawn from another county in order that there might be a fair and impartial trial, which motion was consented to by the State, and acting under the provisions of N. C. G.S. 1-84 and N.C. G.S. 1-86, entered an order for 150 jurors to be drawn from the jury box of Duplin County in an adjoining judicial district, and to appear at the courthouse in Kinston on a specified date. The jury apparently was duly and properly drawn in Duplin County in the presence of Fred W. Harrison, counsel for defendant George Dixon, and others. When the jurors appeared in court, the defendant Arnold moved that the jury panel from Duplin County be quashed on the ground that defendant

Arnold and his counsel, J. Harvey Turner, were not present when these jurors were drawn from the jury box in Duplin County. The trial judge found as facts that J. Harvey Turner told him he could not be present when the jurors from Duplin County were drawn; that the court requested Fred W. Harrison, counsel for defendant Dixon, to represent both defendants when these jurors were drawn from the box in Duplin County; that Harrison consented to do so, and was in fact present when these jurors were drawn from the box. Whereupon, the court denied defendant Arnold's motion. Defendant Arnold assigns this as error. This assignment of error is overruled. There
169 is nothing in the record to indicate that defendant Arnold or his counsel objected to the drawing of the jurors in Duplin County in the absence of either or both, until after it had been done. Under the facts here, we do not think that any of defendant Arnold's substantial rights were affected by the absence of himself and his counsel during the earlier proceedings in Duplin County. He has not shown he was prejudiced in any way by the fact that he and his counsel were not present in Duplin County when the jurors for his trial were drawn from the box. 23 C. J. S., Criminal Law, p. 890, and note 70.

When the 150 jurors drawn in Duplin County, from which panel the trial jury in the instant case was selected and impaneled, appeared in court, the trial judge found as a fact that these jurors were composed of white people and Negroes in about the ratio of 60% to 40%. Defendants assign as error the finding of the judge on the ground that it was based upon the unsworn statement in open court of the sheriff of Duplin County to the judge. The jury panel from Duplin County was in the courtroom where the defendants, their counsel, the judge, and everybody present in the courtroom could see them. Defendants have not shown how they were prejudiced in any way by the judge's finding of fact, and it is impossible to see how they were prejudiced. This assignment of error is overruled.

Each defendant assigns as error the court's allowing the State on the *voir dire* to challenge for cause a number of jurors on the jury panel on the ground that they had conscientious scruples against the infliction of capital punish-

ment. These assignments of error are overruled, for the simple reason that the court, in its discretion, could allow the State to challenge such jurors for cause for incompetency to serve in the case and sustain the challenge, it appearing that such jurors were disqualified. S. v. Vick, 132 N. C. 995, 43 S. E. 626; S. v. Vann, 162 N. C. 534, 77 S. E. 295.

Defendants in their separate briefs make no contention that the confession of each defendant to S. B. I. Agent Edwards was incompetent in evidence. Exceptions in the record not set out in appellants' brief, or in support
170 of which no argument is stated or authority cited, will be taken as abandoned by them. Rule 28, Rules of Practice in the Supreme Court, 254 N. C. 783, 810, where a legion of cases applying the rule are cited; S. v. Strickland, 254 N. C. 658, 119 S. E. 2d 781. However, we have carefully considered the circumstances under which each confession was made as shown in the record, and it appears each confession was made freely and voluntarily without any coercion, force, threats, rewards, or offers of reward, and each confession was properly admitted in evidence. The trial judge instructed the jury that the confession of Dixon was not evidence to be considered against Arnold, and the confession of Arnold was not evidence to be considered against Dixon. Defendants did not request fuller instructions.

The assignments of error of each defendant that Dr. C. E. Cling was permitted, over their objections, to testify as to the cause of George T. McArthur's death are overruled. Defendants stipulated Dr. C. E. Cling is a practicing medical doctor. Dr. Cling testified as to his experience in the practice, and that he holds a degree of doctor of medicine. The court held he was a medical expert. He examined the dead body of George T. McArthur in a funeral home. His testimony as to the cause of McArthur's death is competent. S. v. Mays, 225 N. C. 486, 35 S. E. 2d 494; S. v. Messer, 192 N. C. 80, 133 S. E. 404.

Defendant Arnold's assignment of error as to the admission in evidence against him of a pair of boots and of a pump gun marked State Exhibit 16 is overruled. This assignment of error merits no discussion.

The court instructed the jury:

> "So your duty is to consider the evidence which you have heard in this case, from the beginning of it to the final witness who testified in the case, and to glean from that evidence what you deem to be the truth of the matter, and to apply to what you deem to be the truth of the matter from the evidence in the case, the law which will be hereafter given you by the Court; (and upon that render a verdict which in your conscience and mind substantially speaks the truth.)"

Defendants assign as error the part of the charge in parentheses.

171 Immediately thereafter the court instructed the jury as to presumption of innocence and gave a detailed definition of a reasonable doubt. Defendants do not challenge this part of the charge. Then the court instructed the jury several times that the State must establish defendants' guilt beyond a reasonable doubt before the jury could convict the defendants, and if the jury had a reasonable doubt as to their guilt, they should acquit them.

Defendants assign as error that the court near the end of its charge instructed the jury it was their duty "to render a verdict in this case which according to the evidence in the case and the law which has been and will be given you by the court, that substantially speaks the truth." Then the court went on to charge: "The word 'verdict' comes from two Latin words, *vere* meaning truly, and *dictum* meaning to speak; therefore, let your verdict be a true saying, let your verdict speak the truth." At practically the end of the charge the court instructed the jury "to render a verdict which substantially speaks the truth." Defendants assign this as error.

Each defendant contends in his brief that the court's charge instructed the jury to return a verdict which substantially speaks the truth, which is "a strong departure from the rule which requires that the defendant in any criminal case be proven guilty and found guilty beyond a reasonable doubt by the jury."

These assignments of error are overruled. The excerpts from the charge "render a verdict which in your conscience and mind substantially speaks the truth" and "to render a verdict in this case which * * * substantially speaks the truth," when considered out of context, are erroneous in a criminal case at least, for they are susceptible of the construction that a verdict in a criminal case can be found upon a slight preponderance of the evidence, or upon a slighter degree of evidence than beyond a reasonable doubt. However, these excerpts from the charge will not be held prejudicial, even though they are erroneous when read out of context, because it is our opinion, and we so hold, that it clearly appears the charge considered as a whole presented the law of the case to the jury in such a manner as to have no reasonable
172 cause to believe that the jury was misled or misinformed by these erroneous excerpts, but that they must have plainly understood from the charge that the burden of proof rested upon the State to establish the guilt of the defendants from the evidence beyond a reasonable doubt, and if it had not done so, or if they had a reasonable doubt, of the defendants' guilt, they should render a verdiict of not guilty as to both defendants. Strong's N. C. Index, Vol. I, Appeal and Error, sec. 42, and Strong, Supplement to Vol. I of his Index, Appeal and Error, sec. 42, where in both volumes a great number of cases are cited which support the text.

Barnhill, J., speaking for the Court in Vincent v. Woody, 238 N. C. 118, 76 S. E. 2d 356, said:

> "Ordinarily the presiding judge must instruct the jury extemporaneously from such notes as he may have been able to prepare during the trial. To require him to state every clause and sentence so precisely that even when lifted out of context it expresses the law applicable to the facts in the cause on trial with such exactitude and nicety that it may be held, in and of itself, a correct application of the law of the case would exact of the *nisi prius* judges a task impossible of performance. The charge is sufficient if, when read contextually, it clearly appears that the law of the case was presented to the jury in such manner as to

leave no reasonable cause to believe that it was misled or misinformed in respect thereto."

N. C. G. S. 14-17 provides in part: "A murder * * * which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death." This statute has a proviso to the effect that "if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison."

The defendants assign as error this part of the charge:

"Now there is no conspiracy expressly set out in the bill of indictment and it is not necessary that it should be so included in the bill of indictment, and it is not necessary that it should have been alleged in the bill; but if the State has satisfied you beyond a reasonable doubt from the evidence that these two defendants Dixon and Arnold prior to the time of the alleged killing of Mr. McArthur entered into a conspiracy to rob him, and pursuant to their conspiracy so entered into and while in the attempt to carry out an unlawful purpose, to wit, the robbery of Mr. McArthur, one of them shot and killed him, the other being present, the Court instructs you, Gentlemen of the Jury, that both of the defendants under these circumstances would be guilty of murder in the first degree.

173 "I further charge you, without regard to the existence or absence of a conspiracy, it is a settled principle of law apparently applicable to the facts in this instant case, that where two persons aid and abet each other in the commission of a crime, provided you are satisfied from this evidence and beyond a reasonable doubt that they did so, both being present, both are principals and equally guilty."

This challenged part of the charge is taken practically verbatim from the case of S. v. Donnell, 202 N. C. 782, 164 S. E. 352, where the facts are strikingly similar to the facts

in the instant case, except that in the Donnell case the defendant Lee testified there was no conspiracy or intention on his part to rob the deceased. This statement of the law applicable to the facts in the instant case as charged by the trial court also finds support in S. v. Maynard, 247 N. C. 462, 101 S. E. 2d 340; S. v. Brooks, 228 N. C. 68, 44 S. E. 2d 482; S. v. Kelly, 216 N. C. 627, 6 S. E. 2d 533; S. v. Alston, 215 N. C. 713; 3 S. E. 2d 11; S. v. Stefanoff, 206 N. C. 443, 174 S. E. 411.

It is said in S. v. Maynard, *supra:*

> "Where a murder is committed in the perpetration or attempt to perpetrate a robbery from the person, G. S. 14-17 pronounces it murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. S. v. Kelly, 216 N. C. 627, 6 S. E. 2d 533; S. v. Alston, *supra;* S. v. Donnell, *supra.*"

The assignments of error to the above quoted part of the charge are overruled, for the reason that this challenged part of the judge's charge is correct and is in conformity with many decisions of this Court.

Each defendant assigns as error this part of the charge:

> "As I have told you, on the evidence in this case and the law as the Court understands the law to be and as the Court has explained it to you, you will be permitted to render one of three verdicts: you may render a verdict of guilty as to both defendants of murder in the first degree, you may render a verdict as to both defendants of guilty of murder in the first degree, recommending that their punishment be fixed at life imprisonment, or you may find both defendants not guilty."

These assignments of error are overruled.

Considering the confession made by each defendant and the other evidence of the State strongly supporting the confession of each defendant, there is no evidence of murder in the second degree or of manslaughter. The
174 confession of each defendant is to the effect that prior to the time of the killing of George T. Mc-

Arthur, each defendant entered into a conspiracy to rob him, and pursuant to that conspiracy so entered into, each defendant armed himself with a shotgun and went to George T. McArthur's store, and while in an attempt to rob George T. McArthur, pursuant to the conspiracy so entered into, one of them shot and killed him. The confession of each defendant finds strong support in the testimony of other witnesses for the State. Considering all this evidence for the State—defendants offered no evidence—the only verdict based on the evidence that the jury could find was that both defendants were guilty of murder in the first degree or both were not guilty. There is no evidence tending to show that one defendant was guilty and one defendant was not guilty.

The judge carefully instructed the jury that if they found the defendants guilty of murder in the first degree they had the unbridled discretion in rendering their verdict to recommend that the punishment for both defendants, or either one of them, should be imprisonment for life in the State's prison, and if they did so recommend, the punishment would be in accordance with their recommendation. That there are no conditions, no qualifications, no limitations imposed as to their right to make such a recommendation.

The other assignments of error to the charge have been given careful consideration, and all are overruled. They do not merit discussion.

All the assignments of error of each defendant are overruled. After a careful consideration of the entire record and the brief of each defendant, we find in the trial below no error sufficient to justify a new trial.

No Error.

175 JUDGMENT

SUPREME COURT OF NORTH CAROLINA

No. 291

Fall Term, 1962

Lenoir County

STATE OF NORTH CAROLINA

vs.

JESSE JAMES ARNOLD and GEORGE DIXON

Judgment—February 1, 1963

This cause came on to be argued upon the transcript of the record from the Superior Court Lenoir County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable R. Hunt Parker Justice, be certified to the said Superior Court, to the intent that the proceedings be had therein in said cause according to law as declared in said opinion. And it is considered and adjudged further, that the defendants do pay the costs of the appeal in this Court incurred, to wit, the sum of Fifty-Two and 20/100 dollars ($52.20), and execution issue therefor. Certified to Superior Court this 1st day of February 1963.

A TRUE COPY

ADRIAN J. NEWTON
Clerk of the Supreme Court.
By s/ SARAH B. HANNER
Sarah B. Hanner, Deputy Clerk

176 IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v.

JESSE JAMES ARNOLD and
GEORGE DIXON

Docket Entries and Certification

Appeal docketed—28 March 1962
Case argued—9 October 1962
Addendum to record filed—18 January 1963
Opinion filed—1 February 1963
Final judgment—1 February 1963

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and proceedings in the above entitled case as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 7th day of May 1963.

ADRIAN J. NEWTON
Clerk of the Supreme Court
of North Carolina

SEAL

No. 138 Misc., October Term, 1963

JESSE JAMES ARNOLD and GEORGE DIXON, *Petitioners*,

vs.

NORTH CAROLINA

Order Granting Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari—October 21, 1963

On petition for writ of Certiorari to the Supreme Court of the State of North Carolina.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 572.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 21, 1963

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Office-Supreme Court, U.S.
FILED
JAN 17 1964
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 572

JESSE JAMES ARNOLD and GEORGE DIXON

vs.

STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH CAROLINA

BRIEF OF PETITIONERS

J. HARVEY TURNER,
Attorney for Petitioner,
Jesse James Arnold,
Kinston, North Carolina

FRED W. HARRISON,
Attorney for Petitioner,
George Dixon,
Kinston, North Carolina

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 572

JESSE JAMES ARNOLD and GEORGE DIXON,

Petitioners,

vs.

STATE OF NORTH CAROLINA

APPEAL FROM THE SUPREME COURT
OF NORTH CAROLINA

BRIEF OF PETITIONERS

Opinion Below

The Supreme Court of North Carolina filed written opinion in this cause on the 1st day of February, 1963. The said opinion is reported in the following publications: 258 N.C. 563; 129 S.E. 2nd 229. This opinion of the Supreme Court of North Carolina is reproduced in the printed record before this court, pages 54 through 69. The judgment of the Supreme Court of North Carolina entered on the 1st day of February, 1963, affirmed the judgment of the Superior Court of Lenoir County. The judgment of the Superior Court of Lenoir County was entered during the December, 1961, Special Term and is reproduced on pages 41, 42 and 43, of the printed record before this court.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on the 1st day of February, 1963 (R. p. 54). Petitioners' notice of appeal from the decision of the Supreme Court of North Carolina was filed in this court on the 13th day of May, 1963, in the form of a petition for a writ of certiorari. After the filing of petitioners' statement as to jurisdiction, petition for leave to proceed *in forma pauperis* and petition for certiorari, this Court entered an order granting the petitioners' motion for leave to proceed *in forma pauperis*, and certiorari was granted on October 10, 1963. The jurisdiction of this Court rests upon Title 28, U.S.C.A. Sec. 1257 (3), and Sec. 2101 (d), and under the revised rules of this Court, Rule 22 (1), this being an appeal from the Supreme Court of the State of North Carolina in an action where is drawn in question the proposition that the constitutional rights guaranteed a citizen of the United States may have been violated or denied said citizen by the actions of the State Court.

The defendants below were tried upon a bill of indictment charging first degree murder (R. p. 3), and they were convicted of said offense and sentenced to death (R. pp. 41, 42 and 43). Their appeal in this Court is based upon a denial of due process as contemplated under the 14th Amendment to the United States Constitution in that members of their race, to wit: Negroes, were systematically excluded from the grand jury which returned the bill of indictment against them, because of their race, and upon the further grounds that the State of North Carolina denied them due process when it brought them to trial without a mental examination as required by the order signed in this cause by Albert W. Cowper, Judge (R. pp. 5 and 6).

State Constitutional and Statutory Provisions Involved

a. *Section 17, Article I, Constitution of North Carolina:* No Person taken, etc., but by law of land. No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land.

b. *G.S. 9-1. Jury list from taxpayers of good character:* The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year, 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of the names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names

of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be *non compos mentis*.

c. *G.S. 9-2. Names on list put in box:* The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

d. *G.S. 9-3. Manner of drawing panel for term from box:* At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said

commissioners, may, at the same time, and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

e. *G.S. 9-24. How Grand Jury drawn:* The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

f. *G.S. 9-25. Grand Juries in certain counties:* At the first fall and spring terms of the criminal courts held for the counties of Columbus, Craven, Cumberland, Durham, Gaston, Guilford, Iredell, Johnston, Lenoir, McDowell, Mecklenburg, Moore, Nash, New Hanover, Pitt, Richmond, Vance, Wake and Wayne, Grand Juries shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve during the remaining fall and spring term, respectively. In the event of vacancies occurring in the Grand Jury of Pitt or McDowell county, the judge holding the court of said county may, in his discretion, order a new juror drawn to take the oaths prescribed and to fill any vacancy occurring thereon.

At any time the judge of the superior court presiding over either the criminal or civil court of Cumberland, Durham, Lenoir, McDowell and New Hanover counties may call

said Grand Jury to assemble and may deliver unto said Grand Jury an additional charge. The said judge presiding over either the criminal or civil court of Cumberland, Durham, Lenoir, McDowell or New Hanover counties may at any time discharge said Grand Jury from further service, in which event he shall cause a new Grand Jury to be drawn which shall serve during the remainder of the said fall or spring term. The first nine members of the Grand Jury chosen at the first term of the superior court of Cumberland and Lenoir counties for the trial of criminal causes in the year of one thousand nine hundred twenty-two shall serve during the spring and fall terms, and at the first of such courts of the fall and spring terms thereafter, nine additional jurors shall be chosen to serve for one year. . . .

g. *G.S. 122-91. Alleged criminal may be committed for observation:* Any alleged criminal indicted or charged with the commission of a felony may, on the order of the presiding or residing judge of the superior court, in or out of term, be committed to a state hospital for a period of not exceeding sixty days for observation. The order of commitment shall contain the name and address of the nearest responsible relative, if known, and shall also contain the address of the alleged criminal, if known. *If at the end of the observation period* herein provided the alleged criminal is found to be mentally incompetent of pleading to the charge against him, the superintendent of the state hospital concerned shall report his findings and recommendations to the clerk of the superior court of the county from which the alleged criminal was committed. It shall be the duty of such clerk to bring the report to the attention of the presiding or resident judge of the superior court who may, on the basis of the report of the superintendent, commit such alleged criminal in accordance with the provisions of G.S. 122-83. If the alleged criminal shall be found competent, the superintendent of

the state hospital concerned shall report his findings to the clerk of the superior court of the county from which such alleged criminal was committed and the clerk shall notify the sheriff who shall remove the alleged criminal from the state hospital and return him to the county for trial.

Questions Presented

The Court below has held that the defendants failed to carry the burden of proof and establish that members of their race, to wit: Negroes, had been intentionally excluded by reason of their race from service upon the Grand Jury of Lenoir County. The Court below has also held that the defendants were not deprived of due process under the 14th Amendment of the Constitution of the United States by the failure of the State of North Carolina to provide a mental examination in accordance with the orders signed by Judge Albert W. Cowper. The decision of the Supreme Court of North Carolina is now presented for review by this Court under the authority of Title 28 U. S. C. A. 1257(3), and the following questions are presented to this Court.

a. Did the trial court err in denying the defendants' motion to quash the indictment upon the grounds that members of their race, to wit: Negroes, had been systematically kept from service upon the Grand Jury of Lenoir County?

b. Did the trial court err in overruling the motions for a new trial, and for a mental examination by a competent private practicing psychiatrist and psychologist?

Statement

The two defendants were tried in one bill of indictment for the unlawful, wilful, and feloniously premeditated and deliberate murder of George T. McArthur while engaged in the perpetration of the crime of robbery (R. p. 3). The tax abstracts for Lenoir County show that there are 12,250 White abstracts and 4,819 Negro abstracts listed in Lenoir County, making a total of 17,069 abstracts (R. p. 21). The tax abstracts for Lenoir County also show that there are 5,583 White polls listed and 2,499 Negro polls listed, making a total of 8,082 polls listed (R. p. 21).

In the 24 years, preceding the trial of this case, only one Negro has served upon the Grand Jury of Lenoir County; and one other was placed on, but was discovered to be a resident of Pitt County and was excused (R. p. 22). When the case was called for trial, the defendants moved to quash the indictment on the grounds that Negroes had been excluded from the Grand Jury because of their race (R. pp. 18 and 19). The court overruled the motion so made. The defendants, Arnold and Dixon also moved for a continuance on the grounds that they had not been provided with a mental examination in accordance with the order signed by Judge Albert W. Cowper requiring a mental examination of the defendants (R. p. 8 and R. p. 15). That the court overruled the motions so made, and offered to allow the defendants to be examined any time during the trial.

ARGUMENT

I. That the Court Below Erred by Holding That the Defendants Had Failed to Carry the Burden of Establishing Racial Discrimination in the Selection of the Grand Jury of Lenoir County.

Ever since the decision of *Strauder* v. *West Va.*, 100 U.S. 304, it has been held that the exclusion of Negroes from service upon juries, either petit or Grand, solely because of their race deprives defendant Negroes of the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States, and the only real question concerning exclusion presented in this appeal is whether or not the defendants carried the burden of showing a systematic exclusion of Negroes from service upon Grand Juries in Lenoir County. In support of their motion to quash the indictment upon the charge that members of their race had been systematically excluded from service upon the Grand Jury, the defendants called to testify John S. Davis, the Clerk of the Superior Court of Lenoir County, who testified as follows: That he was the Clerk of the Superior Court of Lenoir County and that he has been employed in that capacity for more than 24 years. Mr. Davis testified further that during that time one Negro has served upon the Grand Jury of Lenoir County, and that a second Negro had been placed upon the Grand Jury during that period of time, but that one was excused because he lived in Pitt County (R. pp. 22, 23). That during that same period of time a number of Negroes have served upon the petit juries of Lenoir County. In addition to the testimony of the Clerk, the defendants put on Milton Guy Williams as Tax Supervisor of Lenoir County, who testified as follows: That according to the tax records of Lenoir County, there are 12,250 White abstracts and 4,819 Negro abstracts,

making a total of 17,069 abstracts. That the tax records of Lenoir County also show that there are 5,583 White polls listed, that is White males between the ages of 21 and 49, inclusive, that there are 2,499 Negro polls listed between the ages of 21 and 49, inclusive. The court refused to allow Mr. Williams to testify that Negroes constituted a separate and distinct class of citizens in Lenoir County, however, he did testify that he is required by the laws of North Carolina to keep White and Negro listing separate (R. pp. 21, 22).

To offset this testimony, the State relied upon statements made by John S. Davis, Clerk of the Superior Court upon cross examination to the effect that Negroes had not been systematically excluded from service on either the Grand or Petit jury to his knowledge. The trial court then took over the examination of the witness and under the Court's examination Mr. Davis testified as follows: "A list of jurors are given us for the January and August terms, and that list is clipped in small bundles and put in a box, and there has been no discrimination of colored people in the selection of the Grand Jury from the list as at those terms. A child under ten then draws the names out of the box until the Jury is selected" (R. pp. 23, 24).

Therefore, it appears from the defendants' evidence that the male population of Lenoir between the ages of 21 and 49, inclusive, is 61 per cent White and 39 per cent Negroes (R. p. 21). The Supreme Court of North Carolina in upholding the conviction of the defendants had this to say in regards to the question of exclusion:

"Defendants' motion to quash the indictment is overruled for the simple reason they have failed to carry the burden of showing facts which would permit a reasonable inference of intentional or purposeful racial discrimination against Negroes in the drawing and selecting of the Grand Jury

which return the indictment against them in the instant case" (R. p. 62).

The defendants in this case have shown all that it was within their power to show. From the record and from the testimony of the Clerk of the Superior Court of Lenoir County, it is apparent that the defendants were indicted by a Grand Jury on which there were no Negroes. From the testimony of the Clerk it appears that during the last 24 years only one Negro has served upon the Grand Jury of Lenoir County (R. pp. 22, 23 and 24). Add to this the testimony of Milton Guy Williams, Tax Supervisor, from which one can determine that Negroes make up about 39% of the population of Lenoir County (R. pp. 21 and 22). With these facts in mind it is obvious that the names of Negroes are not being drawn for service upon the Grand Jury, either they are not reaching the jury panel, or they are not being placed in the box out of which the Grand Jury is drawn, or they are purposefully and by design not being accepted for Grand Jury service, whatever, the case the figures protracted over the period of time involved is a sufficient showing to make out a *prima facie* case of racial discrimination, in the composition of Grand Juries in Lenoir County including the one which indicted these defendants: *Eubanks* v. *Louisiana*, 356 U.S. 584; 78 S. Ct. 970; 2 L ed. 991. *Reece* v. *Georgia*, 350 U.S. 85; 76 S. Ct. 167, 100 L ed. 77. *Patton* v. *Mississippi*, 332 U.S. 563; 68 S. Ct. 184; 92 L ed. 76; 1 ALR 2d 1286. *Hill* v. *Texas*, 316 U.S. 400; 62 S. Ct. 1159; 86 L ed. 1559. *Smith* v. *Texas*, 311 U.S. 128; 61 S. Ct. 164; 85 L ed. 84. *Norris* v. *Alabama*, 294 U.S. 587; 55 S. Ct. 579; 79 L ed. 1074. *Hale* v. *Kentucky*, 303 U.S. 613; 58 S. Ct. 753; 82 L ed. 1050. *Hernandez* v. *Texas*, 347 U.S. 345; 74 S. Ct. 667; 98 L ed. 866.

In the trial of this action the defendants relied upon the case of *Hernandez* v. *Texas*, *supra*. In the *Hernandez* case

the defendant showed that Mexicans constituted a substantial portion of the population of the county in which he was tried and that Mexicans were a distinct and separate class of people, and that no Mexican had served on the jury of that county the past 25 years. According to the decision in *Hernandez*, once the petitioner had shown these facts he had met the burden of proof imposed upon him and the burden then shifted to the State to rebut the *prima facie* showing of discrimination in the selection of the jurors. In the case before this court, the petitioners, Arnold and Dixon, have shown that Negroes constitute a substantial portion of the population of Lenoir County and that Negroes also constitute a separate class of people in Lenoir County, and that only one Negro in 24 years has served upon the Grand Jury in Lenoir County, therefore, under the rule of the *Hernandez* case the indictment against these petitioners is fatally defective and must not stand as the State has not shown any evidence to rebut the *prima facie* showing of racial discrimination.

Having made out a *prima facie* case, the burden no longer remained with the defendants, but shifted to the State. The burden upon the State after a showing that Negroes constituted a substantial portion of the population of Lenoir County and that during the preceding 24 years only one Negro had served upon the Grand Jury was to show that the exclusion of Negroes from service upon the Grand Jury was for some reason other than racial discrimination and the State does not meet this burden by extracting from officials of the county a statement to the effect that there has been no discrimination in the selection of the Grand Jury of Lenoir County. *Hernandez* v. *Texas, supra; Patton* v. *Mississippi, supra; Hill* v. *Texas, supra; Norris* v. *Alabama, supra.*

II. That the Court Below Erred in Sustaining the Trial Court Refusal to Grant the Defendants a Continuance for the Reason That They Had Not Been Given a Mental Examination as Required by an Order Signed by Albert W. Cowper, Judge.

It is admitted by these defendants that the provisions of Sec. 122-91 of the General Statutes of North Carolina, that they were not as a matter of law entitled to receive from the State of North Carolina a mental examination in order to determine whether or not they were competent to stand trial. However, the defendants do contend that once the Resident Judge had in his discretion signed an order requiring such an examination, that then the examination as required in the order became a matter of right, and when the State put the defendants on trial for their lives without first giving them a mental examination, which fulfilled the requirements of that order, they were deprived of due process under both the Federal and the State Constitutions. The futility of the trial judge offering the petitioners an opportunity to be examined by any psychiatrist or psychologist of their choosing during the progress of the trial is apparent. The petitioners in this case were not able to employ counsel and counsel had to be appointed to represent them because of their poverty.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of North Carolina, upholding the conviction of the defendants by the trial court should be reversed by the Court and this matter referred to the Supreme Court for additional action.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1963

No. 572

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Petitioners,

vs.

STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF THE STATE OF NORTH CAROLINA

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF THE STATE OF NORTH CAROLINA

OPINION BELOW

The Supreme Court of North Carolina filed its opinion in this case on February 1, 1963, and the opinion is reported as 258 N. C. 563; 129 S. E. 2d 229. This opinion appears in the official transcript of the record before this Court, beginning on p. 54. The Supreme Court of North Carolina affirmed the judgment of the Superior Court of Lenoir County, North Carolina, which was entered in December, 1961, and appears in the official transcript of record before this Court, beginning on p. 41. The judgment as to both petitioners is of record in the Office of the Clerk of the Superior Court of Lenoir County and in the Office of the Clerk of the Supreme Court of North Carolina and is not officially reported. This Court granted certiorari on October 21, 1963 (11 L. ed. 2d 110—Advance No. 1, November 11, 1963; 84 S. Ct. 153—Advance No. 1, November 15, 1963).

JURISDICTION

The petitioners invoked the jurisdiction of this Court under the provisions of 28 USCA 1257(3). Since the Court has granted certiorari in this case we do not see how 28 USCA 2101(b), and Rule 22(1) of the Rules of this Court have anything now to do with the matter at all. Nor do we think it is correct to say that this is an appeal from the Supreme Court of North Carolina for the simple reason that this Court has chosen to review the matter upon writ of certiorari.

QUESTIONS PRESENTED

It being admitted by the State of North Carolina that eligible persons of the colored race cannot be systematically and purposefully excluded from their opportunity or chance to serve on the grand jury of the county whose grand jury indicted the petitioners, we, therefore, submit that the proper questions are as follows:

(1) The burden of proof being upon petitioners, is there sufficient evidence that persons of the colored race were purposefully and systematically excluded in the organization of the grand jury which indicted petitioners?

(2) Were the petitioners deprived of any rights guaranteed by the Federal Constitution by the denial of their motion for a mental examination by a competent private psychiatrist?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent constitutional provisions and statutes involved in this case are listed and quoted in the Appendix attached to this brief.

SUMMARY OF ARGUMENT

It is the contention of the State of North Carolina that the

evidence of the petitioners is not sufficient to show unconstitutional discrimination in organizing the Grand Jury of Lenoir County when it is made to depend upon the recollection of the Clerk of the Superior Court that only one Negro has served on the Grand Jury during his tenure of 24-years (R. 22). Especially is this true when he himself says it is merely a matter of memory, and when he also says on cross-examination (R. 23) that there have been Negroes on the jury panels in the County and that he does not know of any purposeful or systematic exclusion.

The State of North Carolina will argue that the petitioners having been committed to the State Hospital at Goldsboro for observation and mental examination, and having been examined and a report made thereon, no constitutional right of the petitioners has been violated by the refusal of the Court to continue the case and provide for a mental examination by a private psychiatrist. That this is especially true since the petitioners did not enter any plea of insanty or mental disability, and in the jurisdiction of North Carolina the evidence of lay witnesses as to mental status is competent.

ARGUMENT

A

There is not sufficient evidence of systematic and purposeful exclusion of members of the colored race from service on the grand jury.

A complete transcript of the State record which was before the Supreme Court of North Carolina was certified to this Court by the Clerk of the Supreme Court of North Carolina in the certiorari proceedings (No. 138, Misc., 11 L. ed. 2d 110; 84 S. Ct. 153). In our argument we shall refer to the official transcript of record in this Court as "T.R.", and we will refer to the transcript before the Supreme Court of North Carolina as "S.R.".

The total evidence before this Court as to jury discrimination consists of the evidence of the Tax Supervisor showing that the total amount of the tax abstracts of the County for the white race are 12,250 and the total amount of abstracts for the colored race are 4,819. The white polls listed—between the ages of 21 and 49—are 5,583 for white and 2,499 for the colored. Payment of poll taxes is not a requisite for jury service in North Carolina and has not been for many years. The next evidence for the petitioners is that of the Clerk of the Superior Court, who had held office for about 24 years, and who testified that he could not remember but one colored person serving on the grand jury (T.R. 22). This evidence was given to the best of his recollection. He further testified that another colored person appeared on the grand jury but happened to be a resident of another county. He further testified (T.R. 23) that Negroes had not been systematically excluded from grand jury service and that he had seen Negroes among the jury panels in the County and that the largest number he had seen upon the regular jury panel at one time was four or five (T.R. 23). The grand jury for this County is drawn on a staggered term basis; that is, nine new members are drawn at the January Term and nine new members at the August Term. By referring to the Appendix to this brief, and particularly to Section 9-25 of the General Statutes of North Carolina, the Court will see how the members of the grand jury are drawn for Lenoir County. The Clerk explained (T.R. 23) how the grand jurors' names are drawn by having a child under ten-years of age draw the scrolls which are taken from one box, a list made, and then the scrolls drawn are placed in another box. The complete number drawn for the grand jury, as well as the number drawn for the trial panel, are all mixed together and at the opening of Court another child draws the scrolls from a hat and the first nine appearing serve on the grand jury and the balance on the trial panel.

This in summary is all the evidence produced and counsel for the petitioners state in their brief that this is all the evidence "within their power to show." This cannot be true.

as we will now show. Counsel for the petitioners brought out in redirect examination (T.R. 24) that the Clerk had a record for those jurors who had served in the past, and indeed this is true, because Section 2-42(16) of the General Statutes of North Carolina requires:

> "Each clerk shall keep the following books, which shall be open to the inspection of the public during regular office hours:*** 16. Record of jurors, which shall contain a list of all persons who serve as grand, petit, and tales jurors in his court; which shall be properly indexed."

It is further provided by Section 9-20 of the General Statutes of North Carolina as follows:

> "The Clerk of the Superior Court shall record alphabetically in a book kept for this purpose the names of all grand and petit jurors and talesmen who serve in his court, with the term at which they serve."

Had counsel for petitioners desired to do so they could have had the jury box produced, the names called of those who had served and their race identified or designated. This was not done. Furthermore, counsel for petitioners could have issued a subpoena and had the jury box brought into Court, the names on the scrolls examined and their race identified. This has been done (BROWN v. ALLEN, 344 U. S. 443, 97 L. ed. 469, 73 S. Ct. 397) where in the opinion of this Court it appears: "The jury box was produced in Court, opened, and counsel for defendant permitted to examine the scrolls." Counsel did not follow the pattern of proof in NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074, 55 S. Ct. 579, by showing that there were members of the colored race in the community engaged in businesses and professions requiring intelligence and were eligible and qualified to serve as grand jurors.

It is unnecessary to discuss the cases of this Court dealing with race discrimination in the selection of grand jurors and trial jurors. The cases are collected in an annotation append-

ed to EUBANKS v. LOUISIANA, 356 U. S. 584, 2 L. ed. 2d 991, 78 S. Ct. 970, and the annotation appears on p. 2040 of the law edition citation. This annotation refers to prior annotations appearing in 94 L. ed 856 and 97 L. ed. 1249.

We do not deny the rule that has been established but we do contend that petitioners are required to produce clear and cogent evidence when a state is being tried at the bar of this Court. The discriminatory conduct that is condemned is "purposeful discrimination" or "long, continued, unvarying and wholesale exclusion of Negroes from jury service" (AIKENS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692; NORRIS v. ALABAMA, supra). Proportional representation of races is not required (THOMAS v. TEXAS, 217 U. S. 278; 53 L. ed. 512), and there is a presumption that officers in charge of jury selection perform their duty without discrimination (TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572).

We seriously emphasize that the Clerk of the Court in his evidence never did give the race composition of the grand jury that indicted the petitioners, and the tax supervisor testified that he did not know the race composition of the grand jury that indicted the petitioners but the trial judge stated that he did know because he saw it (T.R. 22). This creates the inference that there were colored persons on the grand jury that indicted the petitioners.

B

There is no constitutional question presented on this record as to the refusal of the Court to continue the case and allow a mental examination by private psychiatrist.

The petitioners make a contention in their brief that they should have been examined by a private psychiatrist, and although the petitioners received a mental examination as provided by the North Carolina statute (See Appendix, Section 122-91 of the General Statutes of North Carolina) the

petitioners seem to contend in some way that the examination was not proper.

This Court will note (T.R. 5, 6) that upon the motion of counsel for the petitioners the defendants were sent to the State Hospital at Goldsboro for observation, and "for the purpose of determining the mental status of said defendant and particularly the degree, if any, of his mental disorder." The Mental Hospital was ordered to file a report and to furnish a copy to the prosecuting officer and to counsel for the petitioners. The contents of the report do not appear in the official transcript of the record of this Court nor did the report appear in the transcript before the Supreme Court of North Carolina. It is assumed, therefore, that the official action in putting the petitioners on trial was correct and that the petitioners were mentally competent. It is noticeable that counsel for the petitioners never did interpose a plea of insanity nor did they allege anywhere that the petitioners were mentally incapable of understanding the nature of the proceedings against them, to make a rational defense and to advise with counsel. In the renewal of motion for continuance (T.R. 8) it was said that the petitioners did not have sufficient mental capacity to understand and realize the charge against them and the effect of a verdict of guilty. This motion is verified by the attorneys for the petitioners. We have been unable to find out what was wrong with the mental examination of the petitioners; this has never been pointed out.

The procedure in North Carolina for trial on the issue of insanity and the issue of whether petitioners are mentally competent to stand trial upon arraignment is pointed out in STATE v. SULLIVAN, 229 N. C. 251, 49 S. E. 2d 458.

Under the North Carolina Practice the petitioners' motions for a continuance was a matter to be determined within the discretion of the trial judge and ordinarily such exercise of discretion does not present a question for review (STATE v. KIRKMAN, 252 N. C. 781, 114 S. E. 2d 633; STATE v. BIRCHFIELD, 235 N. C. 410, 70 S. E. 2d 5; STATE v.

PARKER, 234 N. C. 236; 66 S. E. 2d 907).

If the Court will examine the State record that was before the Supreme Court of North Carolina it will find set out in detail the ruling of the Court on these motions, and on S. R. 15 this Court will see that the trial court found that counsel for the petitioners had had ample time to have their clients examined by a psychiatrist of their own choosing, and the Court then and there offered to counsel an opportunity for petitioners to obtain any private psychiatrist they desired and to have their clients examined at any time during the progress of the trial.

It is noticeable that the petitioners do not cite any constitutional provision which they claim has been violated. Id, furthermore, if this Court will examine the State record or transcript it will find that the petitioners never at any time contended or set up either in the trial court or before the Supreme Court of North Carolina any claim that their constitutional rights had been violated in this respect. An attempt to raise constitutional questions for the first time on an appeal is not approved by this Court (IRVINE v. CALIFORNIA, 347 U. S. 128, 98 L. ed. 561, 74 S. Ct. 381). In IRVINE v. CALIFORNIA, supra, this Court said: "We disapprove the practice of smuggling additional questions into a case after we grant certiorari."

The Supreme Court of North Carolina does not review constitutional questions unless they are properly raised and passed upon by the trial court (STATE v. JONES, 242 N. C. 563, 564, 89 S. E. 2d 129). It is believed that this Court follows the same rule (EDELMAN v. CALIFORNIA, 344 U. S. 357, 97 L. ed. 387, 73 S. Ct. 293).

The rights, privileges, or immunities must be set up in the State courts.

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454;

HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722;

KEOKUK & H. MILTON BRIDGE CO. v. ILLINOIS, 175 U. S. 626, 44 L. ed. 299;

MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U. S. 291, 47 L. ed. 480.

The petitioners have set forth the charge of the trial court in the transcript of the record of this Court. We do not know why this was done unless it is an attempt to have some psychological influence on the Court because a substantial error in the charge to the jury in a criminal case does not deprive the petitioners of the equal protection of the laws (DAVIS v. TEXAS, 139 U. S. 651, 35 L. ed. 300). The error of a State court in applying its own laws of its own State is not a denial of due process (HOWARD v. KENTUCKY, 200 U. S. 164, 50 L. ed. 421). The Constitution of the United States does not guarantee that the decisions of state courts shall be free from error (WORCESTER COUNTY TRUST CO. v. RILEY, 302 U. S. 292, 82 L. ed. 268).

CONCLUSION

The Court can examine the facts in the case by looking at the State record which was before the Supreme Court of North Carolina, and the Court will also find a detailed recital of the facts in the Opinion of the Supreme Court of North Carolina which appears in T.R. at pp. 54, 55, 56, 57. The Court will see that this was a malicious, premeditated murder committed in a barbaric manner without any cause or excuse and that the motive was robbery. There is no evidence that the deceased ever knew or ever did anything that could be considered hostile to the petitioners. This was a murder committed in cold blood without a single extenuating circumstance; the petitioners confessed to the crime, and there is no contention that the confessions were improperly secured and are constitutionally invalid.

The State of North Carolina asks this Court to dismiss these proceedings and to affirm the judgment of the State Court.

Respectfully submitted,

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APPENDIX

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 17, Article I, Constitution of North Carolina: No Person taken, et., but by law of land. No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land.

G.S. 9-1. Jury list from taxpayers of good character: The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year, 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of the names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such jury commissions shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing

within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

G.S. 9-2. Names on list put in box: The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

G.S. 9-3. Manner of drawing panel for term from box: At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners, may, at the same time, and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case,

and then they shall not be discharged until the trial is determined.

G.S. 9-24. How Grand Jury drawn: The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

G.S. 9-25. Grand Juries in certain counties: At the first fall and spring terms of the criminal courts held for the counties of Columbus, Craven, Cumberland, Durham, Gaston, Guilford, Iredell, Johnston, Lenoir, McDowell, Mecklenburg, Moore, Nash, New Hanover, Pitt, Richmond, Vance, Wake and Wayne, Grand Juries shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve during the remaining fall and spring term, respectively. In the event of vacancies occurring in the Grand Jury of Pitt or McDowell county, the judge holding the court of said county may, in his discretion, order a new juror drawn to take the oaths prescribed and to fill any vacancy occurring thereon.

At any time the judge of the superior court presiding over either the criminal or civil court of Cumberland, Durham, Lenoir, McDowell and New Hanover counties may call said Grand Jury to assemble and may deliver unto said Grand Jury an additional charge. The said judge presiding over either the criminal or civil court of Cumberland, Durham, Lenoir, McDowell or New Hanover counties may at any time discharge said Grand Jury from further service, in which event he shall cause a new Grand Jury to be drawn which shall serve during the remainder of the said fall or spring term. The first nine members of the Grand Jury chosen at the first term of the superior court of Cumberland and Lenoir counties for the trial of criminal causes in the year of one

thousand nine hundred twenty-two shall serve during the spring and fall terms, and at the first of such courts of the fall and spring terms thereafter, nine additional jurors shall be chosen to serve for one year. . . . . .

G.S. 122-91. Alleged criminal may be committed for observation: Any alleged criminal indicted or charged with the commission of a felony may, on the order of the presiding or residing judge of the superior court, in or out of term, be committed to a state hospital for a period of not exceeding sixty days for observation. The order of commitment shall contain the name and address of the nearest responsible relative, if known, and shall also contain the address of the alleged criminal, if known. If at the end of the observation period herein provided the alleged criminal is found to be mentally incompetent of pleading to the charge against him, the superintendent of the state hospital concerned shall report his findings and recommendations to the clerk of the superior court of the county from which the alleged criminal was committed. It shall be the duty of such clerk to bring the report to the attention of the presiding or resident judge of the superior court who may, on the basis of the report of the superintendent, commit such alleged criminal in accordance with the provisions of G.S. 122-83. If the alleged criminal shall be found competent, the superintendent of the state hospital concerned shall report his findings to the clerk of the superior court of the county from which such alleged criminal was committed and the clerk shall notify the sheriff who shall remove the alleged criminal from the state hospital and return him to the county for trial.